United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,728

PAUL W. GATLIN,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

No. 17,729

DENNIS O. MILLER,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

INDEX

JOINT APPENDIX

[Filed Nov. 13, 1962]

UNITED STATES COMMISSIONER
DISTRICT OF COLUMBIA

RECORD OF PROCEEDINGS IN CRIMINAL CASES

TRANSCRIPT B
FOR DEF. NO. 3 - Only

1. Paul Warren Gatlin
SEE TRANSCRIPT A FOR DEFS. 1 & 2 -2. Reginald Gatlin

BEFORE - SAM WERTLEB, U. S. Court House, Wash. 1, D. C.

COMMISSIONER'S Docket No. 7 Case No. 19 THE UNITED STATES vs. 3. Dennis O. Miller Criminal No. 1034-62	Complaint filed on Nov. 9, 1962, by Wayland H. Fallin, Official title - Det. Sgt. Robbery Sqd. MPDC, charging violation of United States Code, Title ____, Section _____, on Nov. 9, 1962, at Washington in the District of Columbia as follows: violation of Title 22, D.C. Code, section 2901 - robbery at gun point - took from the person or the immediate possession of Alta Williams about $150.00 in cash, the property of Old Hickory Restaurant at 922 8th St., S.E.

* * * * *

PROCEEDINGS ON FIRST PRESENTATION OF ACCUSED TO COMMISSIONER:

Date Nov. 9, 1962, 1:22 p.m., Arrested by MPDC without warrant.

* * * * *

Proceedings taken - Complaint prepared. Defendant was informed of the complaint and of his right to request a preliminary hearing and to retain counsel. Defendant was not required to make a statement and was advised that any statement made by him might be used against him. Defendant was advised of his right to cross-examine witnesses against

him and to introduce evidence in his own behalf. Defendant Waived Preliminary Hearing. *(involves multiple cases of armed robbery and safe-jobs).

Outcome - DEFENDANT HELD TO ANSWER IN UNITED STATES DISTRICT COURT.

Bail fixed November 9, 1962. Amount, $20,000.* * * * committed to D. C. Jail on November 9, 1962.

[Filed Nov. 14, 1962]

RECORD OF PROCEEDINGS IN CRIMINAL CASES

TRANSCRIPT A
FOR DEFS. 1 and 2 - Only

SEE TRANSCRIPT B FOR DEF. NO. 3 - Dennis O. Miller

BEFORE - SAM WERTLEB, U. S. Court House, Wash. 1, D.C.

COMMISSIONER'S Docket No. 7 Case No. 19 THE UNITED STATES vs. 1. Paul Warren Gatlin 2. Reginald Gatlin Criminal No. 1034-62	Complaint filed on Nov. 9, 1962, by Wayland H. Fallin, Official title - Det. Sgt. Robbery Sqd. MPDC, charging violation of United States Code, Title ___, Section ____, on Nov. 9, 1962, at Washington in the District of Columbia as follows: violation of Title 22, D.C. Code, section 2901 - robbery at gun point - took from the person or the immediate possession of Alta Williams about $150.00 in cash, the property of Old Hickory Restaurant at 922 8th St. S.E.

* * * * *

PROCEEDINGS ON FIRST PRESENTATION OF ACCUSED TO COMMISSIONER:

Date Nov. 9, 1962, 1:22 p.m. Arrested by MPDC without warrant.

Proceedings taken - Complaint prepared. Defendant was informed of the complaint and of his right to request a preliminary hearing and to retain counsel. Defendant was not required to make a statement and

was advised that any statement made by him might be used against him. Each defendant was advised of his right to cross-examine witnesses against him and to introduce evidence in his own behalf.

Outcome - Case Ctd. to Nov. 13, req. of Each Def. in order to contact Legal Aid Agency on behalf Each.

Bail fixed November 9, 1962. Amount $10,000. Each * * * committed to D. C. Jail - Each on November 9, 1962.

* * * * *

PRELIMINARY EXAMINATION:

Date - Nov. 13, 1962. Appearances for) United States - William C. Pryor) Accused - Thomas R. Jones, Legal Aid Agency- Each)

WITNESSES FOR UNITED STATES:

Wayland H. Fallin, Det. Sgt. Robbery Sqd. MPDC

WITNESSES FOR ACCUSED:

* * *

* * * * *

Proceedings taken - Witness Fallin testified that he investigated this robbery; that he responded to the scene and talked to the people involved; that he was advised that about 2 a.m. on Nov. 9 at the Old Hickory Restaurant at 922 8th St. S.E. that 3 negro males entered and each had a gun and that 1 stood at the door while 2 came in and 1 of the 2 jumped the counter and ordered everyone to lie on the floor while he took between $150 and $200. in cash from the register; that Mary Manning of the restaurant described the three men and further stated that the man who jumped the counter wore a full length plaid coat - that one man had a trench coat and the third man wore a 3/4 length black shiny coat which appeared to be leather or leather imitation; that about 10 to 3 a.m. information was relayed to him from police headquarters that a cab driver phoned to say that he picked up 3 men about 3-1/2 blks. from the restaurant and that he was driving them to Nicholas Ave. & Sumner Rd. when a police wagon pulled in behind and 2 of the men jumped out; that the cab driver further stated that he pulled into a gas station on pretext

of needing gas and then the 3rd man jumped out; that Def. Paul Gatlin was arrested by the K-9 Corp 1/2 blk away from the station that Def. Paul said he took part but didn't enter the restaurant; that Paul further said he drove the get away car which broke down at 11th & M and from there he walked to where he was arrested; that Paul gave the name of one Miller as the man who took the money involved; that Paul stated Miller was a friend of his brother co-def. Reginald and that Reginald could furnish information as to where Miller could be found; that he went to Reginald's house to contact him about Miller and there saw black leather coat as described by witnesses; that a line-up was held and Mary Manning picked out Miller and the two defs. here as the men she thought were the men involved in the robbery; that Reginald has made no statements.

Probable Cause Shown as to Each Defendant -

Outcome - EACH DEFENDANT HELD TO ANSWER IN UNITED STATES DISTRICT COURT.

Bail fixed - November 13, 1962. Amount, $10,000. Ea.* * * Committed to D. C. Jail on November 13, 1962.

Certified to be a correct transcript.

Made this 13th day of November, 1962.

Transmitted to Clerk of United States District Court for the District of Columbia, November 13, 1962.

Original Complaint Filed with Transcript B.

[Filed Dec. 10, 1962]

[INDICTMENT]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Holding a Criminal Term

Grand Jury Sworn in on November 6, 1962

The United States of America	:	Criminal No. 1034-62
v.	:	Grand Jury No. 1266-62 1250-62
#1 - Paul W. Gatlin #2 - Dennis O. Miller	:	Violation: 22 D.C.C. 2901 (Robbery)

The Grand Jury charges:

On or about November 8, 1962, within the District of Columbia, Paul W. Gatlin and Dennis O. Miller, by force and violence and against resistance and by sudden and stealthy seizure and snatching and by putting in fear, stole and took from the person and from the immediate actual possession of Sher W. Lee, property of Sher W. Lee, of the value of about $110.00, consisting of $110.00 in money.

SECOND COUNT:

On or about November 9, 1962, within the District of Columbia, Paul W. Gatlin and Dennis O. Miller, by force and violence and against resistance and by sudden and stealthy seizure and snatching and by putting in fear, stole and took from the person and from the immediate actual possession of Mary O. Manning, property of George Casey, of the value of about $150.00, consisting of $150.00 in money.

/s/ David C. Acheson
Attorney of the United States in
and for the District of Columbia

* * *

[Filed Dec. 14, 1962]

PLEA OF DEFENDANTS

On this 14th day of December, 1962, each defendant, 1- Paul W. Gatlin; 2-Dennis O. Miller, appearing in proper person and by his attorney, 1-Thomas Jones; 2-without counsel present, being arraigned in open Court upon the indictment, the substance of the charge being stated to him, each pleads not guilty thereto.

Oral motion of the defendant Gatlin to reduce bond is heard & denied.

Each defendant is remanded to the District of Columbia Jail.

By direction of

MATTHEW F. MC GUIRE
Presiding Judge
Criminal Court #Assignment

* * * * * *

[Filed Jan. 4, 1963]

MOTION TO SUPPRESS
[Paul W. Gatlin]

Comes now the defendant, Paul W. Gatlin, by his attorney, Thomas R. Jones and respectfully moves this Honorable Court for an order to suppress evidence against him in this proceeding and to return to him certain property taken by the police from his person at the time of his arrest on November 9, 1962. This property consists of:

1. A toy gun.
2. A can of motor oil.
3. Fifty dollars in cash.

Defendant further respectfully moves to suppress as evidence any oral confessions or admissions made to police regarding any subject relevant to the indictment herein.

Respectfully submitted,

/s/ Thomas R. Jones
Attorney for Defendant

* * *

[Filed Jan. 11, 1963]

[ORDER DENYING MOTION TO SUPPRESS]
[Paul W. Gatlin]

On this 11th day of January, 1963, came the attorney of the United States; the defendant, Paul W. Gatlin, in proper person and by his attorney, Thomas R. Jones, Esquire; whereupon the motion of the defendant, for the suppression of evidence, coming on to be heard, after arguments of counsel, is by the Court denied.

The defendant is remanded to the District of Columbia Jail.

By direction of

JOHN J. SIRICA
Presiding Judge
Criminal Court #4

* * * * * *

[Filed May 29, 1963]

EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS
[Paul W. Gatlin and Dennis O. Miller]

1 Washington, D. C.
Wednesday, February 6, 1963.

Above-entitled cause came on for trial before HONORABLE DAVID A. PINE, United States District Judge, and a jury, at 1:45 p.m.

* * * * *

6 SHER W. LEE

a witness called by and on behalf of the Government, being first duly sworn, was examined, and testified as follows:

DIRECT EXAMINATION

BY MR. SCHROEDER:

Q. Mr. Lee, I want you to talk slowly and distinctly, please. Would you tell us your name, sir, and your address? A. My name is S. W. Lee, 1201 F Street, Northeast.

Q. And your occupation? A. Grocery store.

Q. Are you the sole proprietor of the grocery store? A. Yes, sir.

Q. Where is that located, sir? A. 1201 F Street, Northeast.

Q. That is in the District of Columbia? A. Yes, sir.

Q. What are the hours of your grocery store, sir? A. The hours of my store? 8 to 9:30.

7 Q. Directing your attention to the evening of November 8, 1962, were you open on that evening? A. Yes. I was open that evening.

Q. And were you attending the store? A. Yes, I am in the store.

Q. And directing your attention to the time between 8 and 9 o'clock that evening did anything unusual happen in your store? A. Well, at 8:50, three men come to my store.

Q. Little slower and clear, please. A. Excuse me; but I can't understand much anyway.

Q. That is all right. A. At 8:50 there were three men come in my store, they go into the back in my meat case, and after a while one man come -- while I am in the front, one man come to the front.

I had $11 in my hand --

Q. Now, were there any other people in the store? A. Yes, sir. I got two men and one lady and a boy in the store.

Q. These were customers? A. Customers; yes.

Q. What happened after this man came to the front of the store?

8 A. When I am in the front they go into the back in the meat case, they are looking around for a while. And one man come out to the front where the cash register is.

I got $11 in my hand, start putting it into the drawer, and then the man step in and they says give me the money, they says give me that, and put something like a gun on my neck.

THE COURT: On your legs did you say?

THE WITNESS: No, my neck; right there (pointing).

THE COURT: Your neck?

THE WITNESS: Yes, my neck.

And then he tell me to go back. I did. I go back inside.

BY MR. SCHROEDER:

Q. Did he do anything there while at the cash register and after putting the gun in your neck? A. Well, after that, I don't know about it, but after that we find out --

Q. What happened to the $11 in your hand? A. Well, they taken it away from my hand.

Q. Who did? A. The man who was coming out the front.

Q. Was that the same man that had the gun in your [neck]?

A. Yes.

9 Q. What about the money in the cash register? A. After I turn back, go back to the meat case, and then after we find that out they gone, and then the moneys are gone too.

Q. And about how much money was in the cash register at the time? A. They taken about $110.

Q. Did you see what the other two men were doing that also came in to the store? A. No, I didn't see them.

Q. Mr. Lee, what did you do after the men left the store?

A. Well, my boy call the, the police.

THE COURT: Your what?

THE WITNESS: My boy.

THE COURT: Employee?

THE WITNESS: No, my boy.

THE COURT: Your son?

THE WITNESS: Yes, my son.

BY MR. SCHROEDER:

Q. Now, after this occurred and the police had been called, did there come a time when you saw any of the people who had come into

10 your store the previous night to hold you up? Did there come a time when you saw any one of these individuals again? A. I don't quite understand what that mean.

Q. Well, on November 9, did you have occasion to go down to Police Headquarters? A. Yes, sir.

Q. What was the purpose of your going down there? A. They tell me to pick out someone who looks like it.

Q. Tell you to pick out someone? A. Yes.

Q. In other words, you were shown the lineup, as the term is used? A. Yes.

Q. Did you see any of the individuals who had robbed you the night before, in this lineup? A. I saw one man that looks like him but I am not sure.

Q. Now, Mr. Lee, I am going to ask you to look around this court room and tell us if you see any of the individuals here who were in the store on the night you were robbed.

MR. MC GRAIL: Objection. The witness has just stated he is not sure.

11 THE COURT: Overruled.

* * * * *

12 BY MR. SCHROEDER:

Q. Mr. Lee, I want you to take your time and look around the court room and tell us if you see anyone who looks like any of the individuals who were in your store on the night of November 8, 1962, and who robbed you. A. No, I don't recognize them.

Q. Thank you.

CROSS EXAMINATION

BY MR. JONES:

Q. Mr. Lee, where were you standing when you first knew that somebody had come into your store and you believed that a robbery was taking place? Where were you standing then? A. I standing at my counter.

Q. Did you say that some of the customers were asked to go into the back? A. Well, some customers gone in the back.

Q. How far is it from where --

THE COURT: Let's get an answer to your question.

Repeat it, will you?

He said some of the customers went back.

You asked him whether any of the customers were asked to go back.

13 MR. JONES: Yes.

BY MR. JONES:

Q. Were any of the customers asked to step back to the rear of the store? A. Well, when the other mens -- when all the customers were standing back aside, almost gone inside my back room, because my back room had a dog in there. They all stopped right in there.

THE COURT: Had a what in there?

THE WITNESS: A dog.

THE COURT: A dog?

THE WITNESS: Yes, a dog in my back room. But my wife stopped them to go in.

THE COURT: You have answered it.

I don't get yet whether somebody asked them to go back.

Did someone ask them to go to your back room?

THE WITNESS: Yes. They says, not by me --

THE COURT: What?

THE WITNESS: Somebody -- my cousin told me my wife --

THE COURT: Don't repeat what they told you.

THE WITNESS: And my wife told me somebody --

THE COURT: No. You can't state what your wife told.

14 BY MR. JONES:

Q. How far is it from where you were standing by the cash register to the back room? A. Around about 20 feet.

MR. JONES: Thank you. Nothing further.

CROSS EXAMINATION

BY MR. MC GRAIL:

Q. Just one thing, Mr. Lee. Your store is at 1201 F Street, Southeast? A. Northeast.

Q. Northeast? A. That is right.

Q. Is there any landmark in that area, any church or hospital or

other landmark by which we can identify it, approximate location of your store?

MR. SCHROEDER: I object, Your Honor. I think the witness has given the exact address and the rest of this business of landmarks is irrelevant.

THE COURT: Overruled.

You may answer.

BY MR. MC GRAIL:

Q. Do you understand me, Mr. Lee? A. Not quite.

15 Q. Is there a landmark such as a church or a hospital or a huge store or something else in the general area of your store? A. No.

Q. This is a residential area? A. Yes.

Q. Are there any other stores nearby? A. Right across the street. Right across from me, right on the corner, a drug store.

Q. Is that the only one in the area? A. That is right.

Q. Other than yours? A. That is the nearest one.

MR. MC GRAIL: Thank you.

MR. SCHROEDER: Nothing further.

THE COURT: Let me ask you, Mr. Lee --

THE WITNESS: Yes, Your Honor.

THE COURT: You were at your counter near the cash register?

THE WITNESS: That is right.

THE COURT: About to put $11 in the cash register; is that right?

THE WITNESS: Yes.

THE COURT: And a man came up and said "Give me that"?

16 THE WITNESS: Yes.

THE COURT: And put something in your -- pressed something against your neck?

THE WITNESS: Yes, sir.

THE COURT: Did you see that something?

THE WITNESS: Yes, sir.

THE COURT: What was it?

THE WITNESS: Looked like a gun.

THE COURT: You saw what, the barrel of a gun?

THE WITNESS: The barrel of a gun.

THE COURT: Then what did you do?

THE WITNESS: He told me to go back, and just turn around and go backward.

THE COURT: Did you give him the money in your hand?

THE WITNESS: He just taken it away from my hand.

THE COURT: And he told you to go back?

THE WITNESS: That is right.

THE COURT: Where did you go back?

THE WITNESS: I gone back around the meat counters, and then try to go in the back room.

THE COURT: Did you go in the back room?

THE WITNESS: No, I didn't.

17 THE COURT: You went behind the meat counter?

THE WITNESS: That is right.

THE COURT: When did you leave that place?

THE WITNESS: When I look around, then they all gone.

THE COURT: You didn't look around until they were gone?

THE WITNESS: Yes.

THE COURT: Did you see the other two men do anything at all except look behind the meat counter?

THE WITNESS: No; never saw them. I didn't see them.

THE COURT: You didn't see them do anything?

THE WITNESS: No, I didn't see them.

THE COURT: All right.

(Witness left stand.)

MR. SCHROEDER: I will call Mr. Charles Payne.

Thereupon,

CHARLES F. PAYNE

a witness called by and on behalf of the Government, being first duly sworn, was examined, and testified as follows:

DIRECT EXAMINATION

BY MR. SCHROEDER:

18 Q. State your name and address, sir. A. Charles F. Payne, 604 - 12th Street, Northeast.

Q. Mr. Payne, are you familiar with Sher Lee's grocery store located on 1201 F Street, Northeast? A. Yes, I am.

Q. Have you frequented that store often? A. Every day. Stop every day.

Q. Directing your attention to the evening of November 8, 1962, did you have an occasion to be in Mr. Lee's grocery store between the hours of 8 and 9 o'clock that evening? A. Yes. A quarter of 9; ten minutes to 9.

Q. While you were in Mr. Lee's grocery store, did anything out of the ordinary or unusual occur? A. Yes.

Q. What? A. We were all standing by the counter, some neighbors around the neighborhood there.

THE COURT: What was that?

THE WITNESS: We were standing around the counter.

THE COURT: Who is "we"?

THE WITNESS: Some friends of ours, neighborhood.

THE COURT: Neighbors?

THE WITNESS: Yes; purchasing things from Mr. Lee, and three men walked in the door.

19 Three men walked in the door, and of course the bell rang as they walked in and we turned around to look and see who was coming in, and one man went all the way down to the other end of the store, to the meat box.

BY MR. SCHROEDER:

Q. That would be in the back of the store? A. Back of the store. And the other went around to the cash register, and the other, the third one, stayed near the crowd, near the people, customers. And they proceeded to corral all of us into the back of the store.

Q. Now let's break this down a little bit. You said one went to the cash register? A. One went to the cash register. The biggest one.

Q. Did you see just what he did when he went to the cash register? A. Well, he went to Mr. Lee and asked for a pack of cigarettes. But he went around almost to the inside, almost behind the counter. He went way close to it.

I don't know whether he got to it, but anyway, he asked for a pack of cigarettes. After that, I handed Mr. Lee $1.30, I think it was, and that's when --

THE COURT: Wait; you didn't see what this man did, then?

THE WITNESS: Not exactly, no. Not exactly.

BY MR. SCHROEDER:

Q. Did you see anything in his hand? A. He had a pistol.

Q. What did he do with it? A. Well, with the pistol he probably poked Mr. Lee --

Q. Did you see what he did with the pistol? A. He was carrying it.

Q. Carrying it? Did he do anything then while at the cash register? A. I didn't see all that, because I was corraled back into the store and I missed all that.

Q. You say you were corraled into the back of the store? A. Yes.

Q. How did this come about? What happened? A. Well, someone put a gun in my side, and I thought someone was playing with me, some of the kids or neighbors was playing with me, and I looked around and they said move on, and I wouldn't move, so they made us all go back alike.

Q. Did you see the gun that was put in your side? A. Yes; it was a little small gun.

Q. And the man that was holding the gun told you to move?
A. Told us to move back to the back of the store.

21 Q. Did you go to the back of the store? A. Went back to the back of the store.

Q. Did you see this man who held the gun on you? A. Yes. I glanced at him when he had the gun on me, like that, real fast, you know.

Q. Now -- A. I glanced at him, see, like that, real quick. Then I went to the back of the store and this same man that was continually shouting "Go back; get back; get back", see, I turned and looked at him to see who he was.

Q. Did you see anything going on with anybody else in the store?
A. Well, before this happened, before this happened one of the men went to the back of the store and he took the wallet out of a man's hand or pocket, took a wallet out of -- one man was facing, had his back turning toward the meat counter and this third man took his wallet from him.

But this man, I haven't seen him since.

Q. Did he take anything from you? A. No, he didn't. I wouldn't give him anything.

Q. Did he ask you for anything? A. Well, he said it was a stickup.

Q. Who said that? A. One of the men.

22 Q. The man that had the gun on you? A. On me, yes.

Q. You said you were able to see the man that had the gun on you?
A. I seen him, yes.

Q. I will ask you to take your time and look around this court room, and tell us if you see the individual who held the gun on you on the night of November 8, 1962 in Mr. Lee's grocery store. A. Move, please.

MR. SCHROEDER: I am sorry.

THE COURT: You can step down.

THE WITNESS: Yes. He wasn't that far away from me.

This man on the end of the table.

THE COURT: I can't hear you.

THE WITNESS: The man at the end of the table.

THE COURT: Put your hand on the shoulder of the man that you saw.

(Complied.)

MR. SCHROEDER: May the record show the witness has identified the defnedant Paul Gatlin.

THE COURT: Yes.

BY MR. SCHROEDER:

23 Q. Now, Mr. Payne, the man you just picked out, is he the man that held the gun on you? A. He is the man; yes; as far as I can identify him.

Q. Now, after you were all herded back to the back of the store, how long did you stay back there? A. Not very long; about a minute or so; probably two minutes. Very short, very short; about two minutes maybe. Maybe two minutes. Short.

Q. Then what happened? A. And then the men fled out the door, they ran out the door, all three of them.

Q. And then what did you do? A. I stayed in the store a very short time, and waited for the police, the police came; someone called the police and the police came.

Q. Did you give the police the description of individuals who had been in there? A. I tried to describe them as best I could; but I was only able to describe one, because it was the only one I saw to look at.

Q. Did there come a time after November 8, 1962 when this robbery occurred, that you once again saw the individuals who had held up the grocery store? A. Well, the following morning --

MR. JONES: Objection.

24 MR. SCHROEDER: Just answer yes or no.

THE WITNESS: Oh, yes.

MR. JONES: Objection. The issue was whether he can identify him here and now.

THE COURT: The only question before me was whether or not

there came a time later on when he identified someone. That is the only thing so far. I think you are a little premature on your objection.

BY MR. SCHROEDER:

Q. Do you remember the date when you next saw the individual -- just the date, now. Do you remember? A. The date; I seen the day after the thing.

THE COURT: What?

THE WITNESS: The day after the thing.

BY MR. SCHROEDER:

Q. Would that be November 9, 1962? A. The 9th, yes.

MR. SCHROEDER: No further questions.

CROSS EXAMINATION

BY MR. JONES:

Q. Mr. Payne, where were you standing in the store when the men walked in? A. I was standing at the counter as you come in the door.

Q. Which counter? A. At the counter where they sell cigarettes, and that sort of thing, and candy.

Q. Where was Mr. Lee standing? A. Mr. Lee was standing behind the counter at the cash register.

Q. Now, how close were you standing to Mr. Lee? A. Well, I was standing about like here, and about, they say, about three feet, maybe down this way where Mr. Lee was. Close to him. I was very close to him.

Q. Were there other customers in the store at that time?

A. Yes, there were.

Q. How many others? A. I don't recall now. Let me see. There was one, two -- I know there was two -- and the man back -- I estimate about five or six customers maybe, five or six customers.

Q. Do you recall where they were standing? A. Most of them were standing right where I was, waiting for service like I was. One man was standing in the back fixing the meat counter.

Q. Do you know the names of those other customers? A. Yes, I do. Not all of them.

26 Q. Well, would you give us the names of the ones that you do know. A. Well, there was -- I can't think of the real name; you call her Pinky all the time; she is a mother in the neighborhood.

THE COURT: You call her what?

THE WITNESS: We call her Pinky. We call her Pinky all the time. I can't think of her real name -- Forbes; yes, Mrs. Forbes, F-o-r-b-e-s.

Mrs. Forbes and her little boy. She had a little boy with her, and I think it was Robert.

BY MR. JONES:

Q. Had a little boy? A. Her little boy.

Q. Do you know anyone else's name who was in there? A. No; that is all I can recall.

Q. But there were five other people? A. Yes; but they were all strangers to me.

Q. Five other customers? A. But they were all strangers to me.

Q. They were strangers to you? A. Yes.

Q. Did you see the three men enter the store? A. Yes. I saw them come in the store.

27 Q. Did the three men enter together? A. They came in together.

Q. Where did the three men go when they went into the store? A. Well, one man proceeded to the back of the store, all the way to the back. One man came around and went over there to Mr. Lee, to his counter, to his cash register area, and one man stayed with the crowd that was waiting for service.

Q. Which man was the closest to you? A. The man that stayed with the crowd. The man that stayed with the group of customers.

Q. You saw these three men come in the door, didn't you? A. Yes.

Q. You got a good look at them? A. I -- oh, no, I wouldn't say that. I couldn't identify them, no.

Q. But you got a look at them? A. I looked at them, yes.

Q. And you said that one man walked to the rear of the store? A. Yes, that is right.

28 Q. Did you notice what he was wearing? A. Appears to me he

was wearing a light coat, a light spring coat like, trench-type, maybe.

Q. What color trench coat was it? A. Khaki, I believe it was. The man at the cash register, he wore a sort of a sporty-looking leather-type coat.

THE COURT: Sporty-looking what, leather?

THE WITNESS: I don't know if it was leather, but it was dark, anyway, a dark sport coat, long and dark. I don't know exactly what it was, but I know it was dark.

But he was hard to identify because he was tall and he was tall and he was behind it -- his apparel was obstructed by the cash register, so I couldn't see exactly what he had on completely.

BY MR. JONES:

Q. You said that someone put a gun to you; is that right? A. That is right.

Q. Where was that gun placed; against what part of your body? A. Right on the side here. Not quite in the back; but side, on the side more or less.

Q. Where were you standing then? A. Where was I standing?

29 Q. Yes. A. By the counter.

Q. How close to the counter? A. Right by it. Right by the counter, next to it.

Q. Which way were you facing? A. I was facing -- I was facing this way -- I was talking to the little boy, I was talking to Mrs. Forbes' little boy at the time; I was kidding with him, you know, playing with him, at the time, and I was facing him, and he was out towards the open floor and I was talking to him, kidding him.

Q. And the gun was placed in which side of your body? A. Left side.

Q. Did you notice anything unusual about this gun? A. Except it was rather -- it seemed to be bare, it was silver lining.

THE COURT: It was what?

THE WITNESS: Silver.

THE COURT: Silver?

THE WITNESS: Shiny. It wasn't a black gun; a rather neutral color, sort of a silver type, silver gun.

BY MR. JONES:

30 Q. Was that held in the left hand or the right hand? A. Of the man who had it?

Q. Yes. A. I didn't pay attention. I didn't pay mind to that.

Q. Did you notice what that particular man was wearing? A. That man wore a little coat for sure.

Q. What kind of a light coat? A. He wore a regular -- wasn't a sport coat; a regular topcoat like, you know.

Q. Did he have a cap on? A. He had a head piece on. He wore a head piece, yes; but I can't recall it. I don't know whether it was a cap or whether it was a turned-up rain hat cap. Maybe it was a turned-up rain hat. In other words, the way he had it it was turned up more or less and I couldn't see whether it was a cap or what it was.

Q. Did you give a description of all of this to the police? A. Of all of this? Oh, yes, I did.

Q. Did you make a statement to the police? A. I made a statement the following day.

Q. Did you make a report to the police about all this? A. I didn't have to because they came to the store where I was. I didn't go home; I waited for them to come.

31 Q. Did a policeman write down your statement while you were giving it to them? A. I guess he did. I didn't pay any mind to it. I was just talking - He probably did, more than likely.

THE COURT: Do you have a statement, Mr. District Attorney?

MR. SCHROEDER: I don't have it, Your Honor. The policemen may.

THE COURT: Well, do you want to inquire?

MR. SCHROEDER: May I, Your Honor?

THE COURT: Let's not waste time on these statements. I will have this jury retire to the corridor while I take a verdict in another case, and in the meantime you can go out and see whether there is such a statement.

MR. SCHROEDER: Yes, Your Honor.

THE COURT: All right.

THE WITNESS: Oh, there is a statement; there is a statement.

THE COURT: Wait just a minute.

THE WITNESS: I am sorry.

(The jury retired from the court room.)

(The jury returned to the court room.)

THE COURT: Did you find the statement for the

32 MR. SCHROEDER: Yes, I did, Your Honor.

THE COURT: Will you turn it over to counsel for defense so he can look at it and do what he wants to do?

MR. SCHROEDER: Yes, Your Honor. (Handing to counsel.)

BY MR. JONES:

Q. Mr. Payne, you said you had a silver pistol that was stuck in you; is that right? A. Yes.

Q. And then what did you do immediately after that? A. What did I do?

Q. Yes. Did you stay there? A. Back to the store, went back to the back, went back to the back of the store.

Q. And did you turn back to look toward the front of the store as you went back? A. Yes, I turned around.

Q. But you walked directly to the back? A. Went to the back; yes, sir. Yes. I was forced to, I had to.

Q. Did this man walk behind you? A. No; not necessarily. He came part of the way but didn't go all the way down.

33 Q. How far did he come? A. I don't recall. Wasn't all the way to the back. It was, you know, midway to the store, maybe. He was satisfied that people had been corraled and he didn't go any farther.

Q. And you were looking backward during this time as you were walking, were you? A. No. I walked back and after I got to my position; then I glanced back.

Q. And what was your position that you got to when you glanced back? A. I went all the way back to the meat counter. All the way

back to the meat counter, then I turned my head back and looked.

Q. How far had you walked before you turned your head? A. I walked all the way back to the meat counter.

Q. How far is that? A. That is the end of the store, far-end of the store where they keep meat.

Q. Is it as far as from you to me? A. Perhaps; yes.

Q. Perhaps? Is it farther? A. Well, we will say that is all, about that far.

Q. About that far? A. I didn't estimate it.

34 Q. And at that point you just turned around? A. Yes.

Q. And what did you see this man doing when you turned around then? A. He was hollering at the customers telling them to get back.

Q. And did you see that silver pistol then? A. Oh, yes; he had it.

Q. What hand was he holding it in at that time? A. I didn't pay attention to what hand. Whichever hand he shoots with; I imagine. I don't know what hand it was.

Q. You gave the police a description of this, didn't you? A. Of what?

Q. Of this man. A. Yes.

Q. Do you remember telling him how tall this man was? A. I recall telling them that the man I identify was not quite so tall. There was a very tall man in there, but that wasn't he.

Q. Do you recall telling the police that this man was about five-feet-four inches tall? A. Yes; average size man. Average size man.

35 MR. JONES: May I ask the defendant Gatlin to rise, please.

(Defendant Gatlin rose.)

BY MR. JONES:

Q. Would you estimate the height of this man? A. Let him stand again. Let him stand once more, please.

(Defendant Gatlin rose again.)

THE WITNESS: That man should be about five-foot-six or -seven.

BY MR. JONES:

Q. Five-foot-six-or-seven? A. Yes.

Q. Wouldn't he be any taller than that? Could he be as tall as six feet?

MR. SCHROEDER: I object, Your Honor. The witness has given his estimate of how tall he considers this man.

THE COURT: Well, this is cross-examination. Overruled.

THE WITNESS: Say what, what you say again.

BY MR. JONES:

Q. Could he be as tall as six feet?

THE COURT: Not whether he could be. Is he in his estimate.

36 BY MR. JONES:

Q. Is he, in your estimation? A. Six feet? No. He is not six feet.

Q. How tall would your estimation be of the man that was five-foot-four? Would it be up to my shoulder? A. I figure a man about my height. I am five-foot-six.

Q. You were five-foot-six? A. Yes.

Q. So this man would be shorter than you, the man you gave the description of to police? A. Shorter than me? He was about my height.

Q. If you told the police he was five-foot-four, he would be two inches shorter than you, wouldn't he? A. I told them he was an average-size man. They might have put that figure on themselves. I told them he was an average-size man, meaning he was five-foot-six; five-five; like that. I couldn't tell how tall he was, really, because I don't estimate people's height.

Q. Now, Mr. Payne, what were you wearing that evening? Do you recall? A. Let me see. What was I wearing? I was wearing a pair of corduroy pants; a corduroy coat; and my brown overcoat; and my hat, regular hat I wear every day.

Q. And do you remember what Mr. Lee was wearing, do you?

37 A. Not exactly; I don't recall Mr. Lee's clothes.

Q. Do you recall what other customers were wearing in there?

A. No. I didn't pay that much attention.

Q. You were in the court room when this trial started this afternoon, weren't you, Mr. Payne? A. When it started?

Q. Yes. A. Yes.

Q. And were you sitting over there? (Pointing). A. Yes, I was.

Q. And were you present when the United States Attorney asked the defendants to rise? A. Yes.

Q. And did you see this man rise at that time? A. I probably did. I couldn't help but see.

Q. You saw him rise at that time, didn't you? A. I saw him rise; yes.

Q. Do you recall when you were asked to identify which man held that gun; do you recall that?

THE COURT: Do you mean here in court?

MR. JONES: Yes; here in court.

THE WITNESS: Say that again.

BY MR. JONES:

38 Q. Do you recall here in court when you were asked to identify which man held that gun upon you? A. Yes; a few minutes ago. Uh, huh.

Q. Do you recall that? A. Yes.

Q. Do you recall looking over there to that corner of the courtroom? A. Well, I couldn't see; couldn't see; because the stand was blocking my view.

Q. Do you recall looking over there? A. No. The only reason why I did that was because I wanted to make sure I identified the right man; that is all.

I started from the rear, and went around like that. That is all.

Q. You knew this man was sitting here, didn't you?

MR. SCHROEDER: I object to that. My question phrased to Mr. Payne was I asked him to look around the whole courtroom.

THE WITNESS: He told me to look around the room, and that is what I did; I followed instructions and started looking like this and on around the room.

BY MR. JONES:

Q. Mr. Payne, how long did you stay in there after this incident

39 had happened? A. I forget. I imagine it was about almost an hour, I

guess. My wife and daughter -- I imagine about an hour, or three-quarters of an hour. Quite a long time.

Q. Were you in the store when the men left? A. I was in when they left; yes.

Q. Did you see which way they went? A. No, I didn't see which way they went. I didn't proceed to the front of the store until Mr. Lee gave us the signal to come on out.

Q. You didn't see which way they went after they left the store? A. No, I didn't.

MR. JONES: Nothing further.

MR. MC GRAIL: I have nothing, Your Honor.

MR. SCHROEDER: Just a few questions, Your Honor.

REDIRECT EXAMINATION

BY MR. SCHROEDER:

Q. Mr. Payne, on cross examination you told Mr. Jones there were a number of customers in the store at the same time? A. Yes.

Q. Did those customers stay until the police came? A. Some didn't. Most of them -- I think about three or four of us stayed; maybe three stayed. I think myself and the man that was robbed, he stayed, and

40 someone else stayed --

Q. And when you were asked to give the names of individuals who robbed the store, and you started to describe the height of one man, was the estimate you gave based on a comparison, namely, between his height -- A. Yes; that is right --

MR. MC GRAIL: Object to the leading question.

THE COURT: I sustain the objection.

BY MR. SCHROEDER:

Q. What process did you use to estimate the height of the individual that held the gun on you?

MR. JONES: Your Honor, I submit this has been explored on cross examination.

THE COURT: Overruled.

THE WITNESS: I will tell you what I did. Not being an expert on heights, what I did, I simply realized there were three men, and one was extremely a rather large man; I mean extra large, larger than the others. One was larger than the others, and one was darker than the others, and so that's the reason I had --

MR. I would like to request to have both defendants stand up at the same time.

THE COURT: They don't have to do it unless they want to.

41 MR. SCHROEDER: No further questions.

THE COURT: Stand down.

(Witness left the stand.)

MR. SCHROEDER: Mr. George Casey; C-a-s-e-y.

Thereupon,

GEORGE M. CASEY

a witness called by and on behalf of the Government, being first duly sworn, was examined, and testified as follows:

DIRECT EXAMINATION

BY MR. SCHROEDER:

Q. Would you tell us your name and address, sir? A. George M. Casey, 922 - 8th Street, Southeast.

Q. Your occupation? A. Restaurant owner.

Q. Are you the sole owner of the Old Hickory Barbecue Restaurant? A. Yes, I am.

Q. Where is that located, sir? A. 922 - 8th Street, Southeast.

Q. Is that in the District of Columbia? A. Yes, sir.

Q. To whom are all the proceeds taken in at the restaurant when you are not in, belong? A. To me.

42 Q. When you are not in who has custody of these proceeds?

A. The waitress and night manager.

* * * * *

43 MARY O. MANNING

a witness called by and on behalf of the Government, being first duly sworn, was examined, and testified as follows:

DIRECT EXAMINATION

BY MR. SCHROEDER:

Q. Give your name and address, please? A. Mary O. Manning, 1107 Howard Road, Southeast.

THE COURT: You will have to speak more distinctly, and louder, please.

THE WITNESS: Mary O. Manning, 1107 Howard Road, Southeast.

BY MR. SCHROEDER:

Q. I want you to speak loud enough so I can hear you way back here.

44 What is your occupation, Miss Manning? A. I work at the Carry-Out Shop, waitress at a carry-out shop.

Q. Where is this? A. 8th and K Southeast.

Q. What is the name of the restaurant? A. Old Hickory.

Q. Were you working at the Old Hickory Restaurant on the early morning of November 9, 1962? A. Yes, I was.

Q. What shift were you working? A. 6 to 2:30.

Q. That is 6 in the afternoon? A. Yes.

Q. Until 2:30 in the morning? A. That is right.

Q. And would I be correct in assuming that you started work at 6 o'clock November 8, 1962, and worked until 2:30 November 9, 1962? A. That is right.

Q. While you were working between the hours of 6 and 2:30 on those dates, did anything unusual occur at the restaurant? A. Not early. A little before it was time for me to check out, about 2 --

45 Q. What time would this be? A. I would say it was about between 2:20 -- 2:15 and 2:20.

Q. Now, around 2:15 to 2:20, November 9, 1962, did anything unusual happen at the restaurant? A. Yes.

Q. Would you tell us about it, please? A. Two men came in the place and held it up.

Q. Well, you say two men walked in. A. Yes.

Q. Just what did they do? A. Well, at present I was down at the coffee stand.

Q. In the restaurant? A. Yes.

Q. What were you doing there? A. Drawing coffee.

Q. And what happened then? A. When I turned everyone in the place was on the floor.

Q. By "everyone" whom do you mean? A. Well, all the employees and the customers was in there.

Q. How many other employees were on duty at that time? A. Two.

46 Q. Then what happened? A. Then when I looked around this gentleman said "You get on the floor, too."

Q. Did he have anything in his hands when he said it? A. He had a gun.

Q. Did you see the gun? A. Yes, I did.

Q. Did he point it at you? A. Yes, he did.

MR. MC GRAIL: Object to the leading nature of the questions.

THE COURT: Sustained.

What did he do with the gun?

BY MR. SCHROEDER:

Q. What did he do with the gun? A. Pointed it at, waved it at me and told me to get on the floor too.

Q. And what did you doo? A. I got on the floor.

Q. Did you see anything else happen after that? A. No.

Q. Were you able to see the man who waved the gun at you?

47 A. Yes, I was.

Q. Did there come a time after this event on November 9, 1962, in the restaurant, when you saw the same individual again at a later time? A. Yes.

Q. I now ask you to look around the court room, Miss Manning, the whole courtroom, and tell us whether you see the individual who on the early morning of November 9, 1962, was the one who waved the gun in front of you --

MR. MC GRAIL: Objection and ask to approach the bench, if I may.

THE COURT: Yes, you may.

(At the Bench:)

MR. MC GRAIL: I would like to object on the grounds that the availability of testimony of this witness is solely the result of an illegal arrest of the defendant Miller, and therefore is the fruit of that illegal arrest.

The illegal arrest took place and subsequently as the result of that, they were able to obtain this witness, Mrs. Manning, who presumably is able to testify and identify this witness as the result.

I object on the grounds it is the fruit of an illegal arrest, and product of it.

48 THE COURT: Overruled.

MR. JONES: May I join in the objection?

THE COURT: Yes. Overruled.

(Open Court:)

BY MR. SCHROEDER:

Q. Now, Miss Manning, take your time and look throughout the whole courtroom and tell us if you see the individual who on the early morning hours of November 9, 1962, was present, namely, that individual who waved the gun and told you to get on the floor. A. Yes.

Q. Would you point him out for us, please? A. The gentleman in the brown sweater.

THE COURT: In the what?

THE WITNESS: Brown sweater.

THE COURT: Will you step down and put your hand on the man that you referred to -- the shoulder of the man.

(Witness stepped to Defendant and touched.)

THE COURT: Very well; return to the stand.

MR. SCHROEDER: May the record show that the witness has pointed to the defendant Dennis Miller.

THE COURT: Yes.

BY MR. SCHROEDER:

49 Q. Now, after these events, namely, that you were lying down on the floor, what happened thereafter? A. Not anything; a lot of detectives came in; that is all.

MR. SCHROEDER: No further questions.

THE COURT: Well, what happened with reference to the two men, including the one that waved the gun in front of you?

THE WITNESS: They taken all -- cleaned out the cash register and then they left.

THE COURT: Then they left?

THE WITNESS: Yes.

THE COURT: Then you got up?

[THE WITNESS: Yes.]

[THE COURT:] All right. Go ahead, gentlemen, and cross-examine.

MR. JONES: No questions, Your Honor.

MR. MC GRAIL: Indulge me a moment.

THE COURT: Certainly.

(Mr. McGrail conferred with his client.)

CROSS EXAMINATION

BY MR. MC GRAIL:

Q. Mrs. Manning, are you married? A. Yes, I am.

Q. Is that your married name? A. Yes, it is.

50 Q. Now, if I understand correctly, Mrs. Manning, you were back at the coffee stand. A. That is right.

Q. And the first thing you heard was what, in respect to this incident you have described? A. "You get down, too."

Q. That is the first thing you heard? A. Yes.

Q. And your back was to the door, front door? A. Yes, it was.

Q. And before someone said that to you, you heard nothing?

A. No.

Q. And the man you have identified, was he the man you said, said "You get down, too"? A. Yes.

Q. So you then turned and you say you noticed that everybody was down on the floor? A. I had my back to the door, and when I turned I noticed everybody was down.

Q. And how many people would everybody be? A. Well, there was two employees, and I don't know exactly how many customers.

Q. You didn't know how many customers? A. No.

51 Q. Was there more than one? A. Yes, sir.

Q. More than six? A. I don't know. I know there was more than one.

Q. Do you have trouble with your eyes, Mrs. Manning? A. No, I don't.

Q. You do not have trouble with your eyes? A. No. I wear glasses but I don't have trouble with my eyes.

Q. Beg pardon? A. I wear reading -- I use reading glasses but I don't have trouble with my eyes.

Q. They seem to be watery now. Are they? A. Yes. A little.

Q. Why is that, do you know? A. Rest working. I haven't had but two hours' rest --

Q. I could not hear you. I am sorry. A. I said I haven't had but two hours' rest.

Q. And do you have more than one job? A. No, I don't.

Q. Have you been ill recently? A. No, I haven't.

Q. What time did you get off duty this morning? A. 2:30.

52 Q. Do you state that you went on duty at approximately 6 o'clock, 6 p.m. in the evening before the robbery? A. Yes, I did.

Q. And where were you prior to 6 o'clock that afternoon?

A. Where was I?

Q. Yes. A. At work.

Q. No; prior; before 6 o'clock, during the afternoon? A. At home.

Q. You were at home? A. Or on my way to work; something like that. Probably at home.

Q. You say you have no trouble with your eyes? A. No.

Q. Do you have any trouble with your hearing? A. Yes; a little.

Q. What is that? A. A little with my right ear.

Q. Are you hard of hearing? A. No. I am not.

Q. And where do you live? A. 1107 Howard Road.

53 Q. Howard Road? A. Yes.

Q. How long have you lived there? A. Since '55.

Q. Since 1955? A. Yes.

Q. Now, you identified the defendant Miller. How was he dressed when you saw him? A. He had on some kind of a plaid coat.

Q. Was this an overcoat or a topcoat or a short coat, or what? A. It was some kind of a long coat, a three-quarter length coat, or something, because I couldn't see the end of it.

Q. And you say it was plaid? A. Yes; plaid; or checked; one of the two.

Q. What color? A. Well, I couldn't distinguish it. But it was between a blue and a gray.

Q. Did he wear a hat? A. Yes, he did.

Q. What type of hat? A. It was I would say a gray hat.

Q. Was it pulled down over his face or eyes? A. No.

Q. It was not? A. No.

54 Q. Was the collar of the coat turned up? A. No.

Q. Now, Mr. Miller is not wearing a coat or a hat now. How do you identify him -- by what characteristics or features? A. His profile.

Q. Well, he is facing you directly, isn't he? A. Yes.

Q. You can not see his profile now, can you? A. No. Only I can see him well enough to say he has high cheekbones.

Q. Any other characteristic? A. Kind of a, I don't know, but enough to say it was him. I would say it was him.

Q. You would say it was him? A. I would; yes.

Q. By reason of the high cheekbones? A. No, by reason of the looks of him now and the looks of that night.

Q. Well, see, that is what I want to find out: What else besides the high cheekbones makes you think Mr. Miller was the man who came

in the store that night as you described? A. His color.

Q. All right. His color and high cheekbones. Anything else?

55 A. And the way he smiles. And the way he smiled at me.

Q. Did he smile when he put -- A. Yes.

Q. When he told you to get down on the floor? A. Yes. He said "you get down, too".

Q. Where was he standing when he said that to you? A. Well, he was previously up at the upper end of the counter and then he walked down where I was.

Q. And your back was to him when he came up to you; right? A. When I first looked around -- when I first turned, he was up to the upper end of the counter and then he walked down and told me "You get down, too."

Q. And were you facing him? A. Yes, I was.

Q. You were facing him at that time? A. Yes.

Q. All right. Then it is the high cheekbones, the color and perhaps the smile that makes you think Mr. Miller is the man that came in the store that night? A. I would say so.

Q. And he had an overcoat, and a hat? A. Yes.

56 Q. Was there anything else about his face that you now recall? A. Not to say.

Q. Well, let's look at it the other way. Is there anything different about Mr. Miller from the man you saw on that night? A. No.

Q. There is nothing different? A. No. Only different clothes; that is all.

Q. What? A. Only different clothes; that is all.

Q. And are you as sure of that as you are of the rest of your testimony? A. Yes, I am.

Q. You are positive of that? A. Yes, sir.

Q. The only difference is that he has different clothes on now? A. That is right.

(Counsel confers with defendant.)

MR. MC GRAIL: That is all I have, Your Honor.

MR. SCHROEDER: I have nothing further.

THE COURT: Madam, did you see him take any money?

57 THE WITNESS: No, he didn't take any money. It was another --

THE COURT: Wait a moment. I asked you if you saw him take any money.

THE WITNESS: No, he didn't take any money.

THE COURT: All right.

Did you see anybody else take any money?

THE WITNESS: Yes. There was another fellow with him.

THE COURT: What is that?

THE WITNESS: There was another fellow with him taking the money.

THE COURT: Do you see that other fellow in court?

THE WITNESS: I am not sure of him, because I didn't see him in his face.

THE COURT: I see.

Did you want to ask some questions?

MR. JONES: Yes, Your Honor.

CROSS EXAMINATION

BY MR. JONES:

Q. Was this other person that you saw tall or short in statute?

A. I wasn't -- I am not too sure about him, whether he was short or tall. All I saw him was crossing the counter, going outside.

58 I couldn't tell.

THE COURT: You are excused, Madam.

(Witness left the stand.)

* * * * *

59 Washington, D.C.
Thurs., February 7, 1963

* * * * *

60 ALTA WILSON

a witness, called by and on behalf of the Government, being first duly sworn, was examined, and testified as follows:

DIRECT EXAMINATION

BY MR. SCHROEDER:

Q. Would you give your name and address, please? A. Alta Wilson, W-i-l-s-o-n, 1875 California Street, Northwest.

Q. Your occupation? A. Waitress.

Q. Where? A. Old Hickory Barbecue.

Q. And how long have you been working there? A. Going on three years.

Q. Were you working on the morning of November 9, 1962? A. Yes, I was.

Q. What shift were you working? A. The 1:00 o'clock shift.

Q. Would that be 1:00 o'clock in the morning? A. Yes.

61 Q. Until when? A. 9:30.

Q. Now, directing your attention to the early morning hours of November 9, 1962, did anything unusual happen in the Old Hickory restaurant while you were on duty? A. Well, I was on duty and I was waiting on a customer, and while I went to the register to give this man the change for his order --

Q. I am sorry. You were at the register? A. I was going to the register to give a man change from his order.

THE COURT: From the bar?

THE WITNESS: Yes, uh, huh.

BY MR. SCHROEDER:

Q. And then what happened? A. And this other boy had told me to give him change for a quarter, so I took the quarter and went to the register. When I opened the register up, when I know anything, someone was coming across the counter, pointing a gun and told me to lay on the floor.

Q. Did you see the gun? A. Yes, I saw the gun.

Q. What did he do with it? A. He pointed it at me and told me

62 to hit the floor.

Q. Then what did you do? A. So I just laid down on the floor.

Q. What did he do? A. So he opened it, went into the register drawer, and was taking the money out.

Q. Approximately how much money was taken out of the register, if you know? A. Well, it was a maximum of $150.

Q. Then what happened? A. Then, well, I could hear some more talking but I couldn't see them, I don't know who they were, and they were telling the customers and everybody else to hit the floor.

Q. Then what happened? A. And then they left.

Q. Then what did you do? A. Then everybody -- I heard some people saying "You all can get up; you all can get up;" so we all then got up and went back to the back.

Q. And then what? A. And then the man in the back came out and called the policemen and called the boss man.

Q. And did you talk to the police? A. When they came down there I talked to them.

63 Q. What did you tell them? A. I told them I couldn't identify anyone because --

THE COURT: Gentlemen, if you wish to object, you must do so seasonably.

I saw an effort on the part of one counsel to rise.

Were you rising to object or not, sir?

MR. JONES: Yes, your Honor.

THE COURT: You asked her what she said to the police out of the presence of the defendant, Mr. Schroeder. I have to sustain the objection to that.

Mr. Jones, please speak up and don't wait until the answer is in, if you wish to object.

MR. JONES: Yes, sir.

THE COURT: I saw you rise and I believe Mr. McGrail started to rise.

All right. Go ahead.

THE WITNESS: And I told the police --

THE COURT: No; don't state what you told them.

BY MR. SCHROEDER:

Q. You did talk to the police? A. Yes.

Q. Did there come a time thereafter when you saw the individual who held the gun on you, namely, after the early morning hours of November 9, 1962? A. Did I do what?

64 Q. Did you ever see that individual again? A. No. I wouldn't know him if I was to see him, because I didn't get that good a look at him.

Q. Did you know who the money in the cash register belonged to? A. It belongs to the owner, Mr. Casey.

MR. SCHROEDER: No further questions.

CROSS EXAMINATION

BY MR. JONES:

Q. Miss Wilson, you did make a statement to the police?

Did you make a statement to the police? A. Concerning what?

Q. Just, did you make a statement about the incident to the police? A. Did I make a statement?

Q. Yes. A. Well, he asked me --

Q. Just answer the question yes or no. A. To what point; when they came to the place?

Q. Yes. A. Yes. I answered the questions he asked me.

Q. And was this statement reduced to writing? A. To write?

Q. To writing. Was the statement reduced to writing; the state-

65 ment that you made. A. Did I write it?

Q. Was it reduced to writing in your presence? In other words, did the policeman reduce your statement to writing, did he type up a statement? A. Yes. He was writing on a piece of paper as I was talking to him.

MR. JONES: No more questions.

THE COURT: Did you sign the paper that he wrote?

THE WITNESS: No; I haven't signed anything as I know of.

CROSS EXAMINATION

BY MR. MC GRAIL:

Q. Mrs. Wilson, how many other people were in the restaurant at this time, at the time of the incident? A. It was two other waitresses and about five or six customers.

Q. And are those two other waitresses still employed at the Hickory House? A. One are and one is not.

Q. Who is not? A. Patricia Miller is not.

Q. Patricia Miller? A. Yes.

66 Q. Does she live in this area? A. I wouldn't know.

MR. SCHROEDER: Objection. I don't think the witness is qualified to answer that.

THE COURT: If she knows, she can answer; and if she doesn't she can say she doesn't.

Overruled.

BY MR. MC GRAIL:

Q. You said you did not know? A. I really don't know.

Q. Would you say you were one of the first ones or the last ones to get down on the floor? A. I was the first one.

Q. And when you were told to get down on the floor was this said to you in a loud voice? A. No. He just said, "Lay on the floor" and pointed his gun and I just hit the floor and didn't do anything else.

Q. What did the customers do? A. Well, then I could hear somebody else talking to the customers but I don't know who they were.

Q. And the customers got down on the floor? A. Yes.

MR. MC GRAIL: That is all.

THE COURT: Stand down.

67 (The witness left the stand.)

MR. SCHROEDER: Mr. William Garnett.

Thereupon,

WILLIAM GARNETT,

a witness, called by and on behalf of the Government, being first duly sworn, was examined, and testified as follows:

DIRECT EXAMINATION

BY MR. SCHROEDER:

Q. Would you state your name and address? A. My name is William Garnett, and my address is 3100 South Dakota Avenue, Northeast.

Q. Your occupation, sir? A. Full-time taxicab operator.

Q. How long have you been a taxicab operator? A. Approximately 18 months.

Q. Do you work for a company or are you an independent driver? A. I am an independent driver.

Q. What are your hours on duty? A. No special hours.

Q. Directing your attention to the early morning hours of November 9, 1962, were you driving your taxicab at that time? A. I was.

Q. At that same period of time did you have an occasion to pick
68 up three male passengers? A. I did.

Q. Did anything unusual occur as the result of this fare? A. After I had the address, I got the address that the passengers wanted, and during the time of discharging two passengers --

Q. Well, let me ask you this first: Where did you pick up these three passengers? A. 900 block of 12th Street, Southeast.

Q. And at approximately what time? A. Between 2:30 and 3 o'clock in the morning.

Q. That would be on November 9th? A. That is right.

Q. Now, after you picked up these passengers, what happened? A. I was given an address, and the address was on Sumner Road, and when I was discharging two of the passengers the patrolman pulled in on the bumper, --

THE COURT: What is that; I didn't hear you.

THE WITNESS: As I was discharging two of the passengers, the patrol wagon pulled in on the bumper in the back of the car.

BY MR. SCHROEDER:

69 Q. Where were you discharging these two passengers? A. In the 1100 block of Sumner Road Southeast.

Q. Then what happened? A. Two of the passengers -- originally the three was supposed to get out but after the patrol wagon pulled in, only two got out; the other decided to stay in and ride further, but he couldn't give me an address. So he just wanted to go across one of the bridges, and I still couldn't get an address, so I didn't want to be riding a man around that couldn't give me an address, so I pulled into the service station --

Q. You say he could not give you an address? A. No.

Q. Did you ask him for an address? A. Yes. I asked him for an address.

Q. And then what happened? A. So I pulled in a service station at South Capitol and Howard Road and I told the attendant at the service station to stall around a while because I had a man in my car that was acting suspicious and I wanted to get him out.

In the meantime the passenger that I had, he got out and ran.

Q. Did you see him get out? A. Yes.

70 Q. Did you see him run? A. Yes.

Q. Did you see where he ran? A. Ran behind the service station. I lost him after that, because it was dark.

Q. Then what did you do? A. After he finished checking the oil, water and the battery, I come back up Howard Road to Nichols Avenue and I met the same patrol wagon there that had pulled into my bumper when I was discharging the first two passengers, so I told them what had happened, about the man was acting suspicious so they come back down to the spot that the fellow had ran and they called the police.

Q. Did you take them back to the spot? A. The police?

Q. Yes. A. Well, they followed me back down. I was driving my car and they were in a patrol wagon.

Q. Then what happened? A. They alerted the rest of the police in about five minutes.

Q. Look around the court room and tell us if you see any of the individuals that rode in the taxicab at that time, any of the three individuals you have talked about here who you picked up that morning

71 on November 9, 1962. A. No. I don't see any of the passengers I had that morning.

Q. What happened after you came back to the police station -- I am sorry; after you came back to the gas station. A. Well, after I got back the police -- in about five minutes the police was there and the detectives and the dogs, and so they started to work right from there.

Q. And what did you do? A. Wasn't nothing to do. I just stayed around. I couldn't leave. I had to stay around, though.

Q. Did you give these policemen a description of that individual? A. Yes, I did.

MR. SCHROEDER: No further questions.

CROSS EXAMINATION

BY MR. JONES:

Q. Mr. Garnett, you said that you gave the police a description of this individual that was acting suspicious in your cab; isn't that right? A. That is right.

Q. What description was that, if you recall? A. The description that I gave for the man that I had in the car at that particular time, was a kind of small-featured fellow, real light brown complected, wearing

72 a topcoat and a hat -- an overcoat and a hat.

Q. Now, how light do you mean when you say real light brown? Would you say, for example, that it was lighter than this man here, indicating the defendant Garlin? A. I would say by using the term light brown, I would say the man was a lighter brown than I am.

Q. Lighter brown than you? A. That is right.

Q. Were you able to estimate this man's height? A. I would say approximately five feet eight inches.

Q. Five feet eight inches? A. Yes; approximately.

THE COURT: Now, that is the man who went with you to the gas station?

THE WITNESS: That is right, sir.

BY MR. JONES:

Q. Now, would you tell us exactly where this gas station was? A. This gas station was located right in the corner of Howard Road and Suitland Parkway, where they intersect.

Q. And it is an Esso station; is it? A. I can't remember whether it was Esso or not.

73 Q. Could you give us a further description of what this man was wearing? A. He was wearing a brown tweed overcoat or topcoat, and a hat.

Q. Was it a hat or a cap? Could you describe the head cover? A. It was a brim hat.

Q. I think you said this man was acting suspicious.

Would you tell us exactly what he was doing that made you conclude that he was acting suspicious? A. Well, when I stopped to discharge the first two passengers and a patrol wagon pulled in on my bumper, as I said, this one particular man looked out the back glass and seen the patrol wagon, and then he said "I can't get out here", and the other two men got out and that is when he gave me the address to proceed further across the bridges.

Q. Was that the only thing that made you conclude that he acted suspiciously? A. That, and -- well, I can't say what he had in his pocket; I didn't see; but it was something in his pocket projecting down in the lining of his overcoat. I don't know what it was; I couldn't say what it was.

Q. You didn't see what it was? A. No.

74 Q. This information you have just told me, in other words the description of the individual and the suspicious circumstances under which you thought he was acting, did you impart that same information

to the police, as you recall, to the best of your recollection? A. As I can remember, it is the same statement I have been making all the way through; the same just like I told it.

Q. I want you to look once more at this man here.

(Defendant stood up.)

BY MR. JONES:

Q. Was this the man that was sitting in that cab? A. No.

MR. JONES: Thank you.

CROSS EXAMINATION

BY MR. MC GRAIL:

Q. One question, Mr. Garnett:

Was this the man here who was sitting in the cab? A. No. I have never seen him before.

MR. MC GRAIL: Thank you.

MR. SCHROEDER: I have one question, Your Honor.

REDIRECT EXAMINATION

BY MR. SCHROEDER:

Q. You have been a cab driver for three years, did you say?

75 A. No, I didn't. 18 months.

Q. During the course of your occupation as a cab driver, was it usual for people to get in your cab and just drive around the city?

A. No.

MR. SCHROEDER: No further questions.

THE COURT: When you reached that address on Sumner Road, you stopped; is that correct?

THE WITNESS: That is correct.

THE COURT: And at that moment you looked in your rear-view mirror and saw a patrol wagon in your rear?

THE WITNESS: That is right.

THE COURT: And at that time two men got out?

THE WITNESS: Correct.

THE COURT: Did you get a good look at those two men?

THE WITNESS: I did.

THE COURT: Then what happened to those two men?

THE WITNESS: They disappeared down in the court.

THE COURT: Down in the what?

THE WITNESS: Down in the court. The houses sit back in a court, so they went in a court.

THE COURT: Were either of these men seated at counsel table

76 those two that got out? A. No, they wasn't.

THE COURT: All right. Stand down.

(Witness left the stand.)

MR. SCHROEDER: Private Fallin, of the Canine Corps.

MR. JONES: May we approach the bench?

THE COURT: Yes.

(AT THE BENCH:)

MR. JONES: I want to know, if Your Honor please, at which time you would entertain a hearing on the motion to quash the arrest?

THE COURT: Now, haven't you filed a motion to quash the arrest?

MR. JONES: Yes.

THE COURT: And has that not been ruled on?

MR. JONES: It was denied once, yes.

* * * * *

78 THE COURT: I think under those circumstances I have to hear it.

* * * * *

THE COURT: The jury will be excused.

(The jury retired from the court room.)

HEARING OUT OF PRESENCE OF JURY

MR. JONES: Your Honor, should there be any oral admissions offered in this case I would also like a hearing out of the presence of the jury to determine their admissibility.

THE COURT: Yes.

79 All right. Put the officer on, Mr. Schroeder.

They seem to think this is a case where it should be heard out of the presence of the jury.

MR. SCHROEDER: If I may, in order to expedite this matter, Your Honor, with your permission, I might just as well call all the police officers, because they are going to eventually testify to the admissions and the arrests that they made.

THE COURT: Yes. Let's do it all at once.

MR. SCHROEDER: Private Fallin, take the stand, please.

Thereupon,

JAMES H. FALLIN,

a witness, called by and on behalf of the Government, and, being first duly sworn, was examined, and testified as follows:

DIRECT EXAMINATION

BY MR. SCHROEDER:

Q. Would you state your name and duty assignment, please?

A. Private James H. Fallin, F-a-l-l-i-n, assigned to the Canine Corps.

THE COURT: Spell your name, please.

THE WITNESS: F-a-l-l-i-n.

BY MR. SCHROEDER:

Q. How long have you been assigned to the Metropolitan Police Department? A. Approximately five years.

80 Q. Directing your attention to November 9, 1962, did you have an occasion to respond to a call in the vicinity of South Capitol Street and Howard Road? A. Yes, I did.

Q. What brought that about, if you know? A. Previous to the call to respond to South Capitol and Howard Road, we had received a call to respond to 8th and K Streets, or at 922 8th Street, Southeast, for a robbery that had taken place at that location.

We responded to that location and it was a lookout given for three colored males that allegedly had robbed the place.

About 45 minutes later, after returning back into service, we received another call to respond to South Capitol and Howard Road. The dispatcher said that a cab driver had previously made a call, and

thought that three suspects allegedly could have been the ones that committed the holdup at 8th and K Streets Southeast.

Q. Was a description given of the -- when you say a, I believe a flash, or a call -- does that mean a description was given of the three individuals who supposedly robbed the Hickory House? A. Yes. It was a general description of three colored males.

81 Q. On the second call relating to the gas station on South Capitol Street, was a description given? A. I don't remember.

Q. Did you respond to the call at South Capitol Street and Howard Street? A. Yes, I did.

Q. And what happened? A. On arriving at the scene, a cab driver and all the cruisers and scout cars were on the scene, and they pointed out to me that the suspect had fled from a cab and had taken flight behind an Esso station at that location.

I immediately took the dog out of the cruiser, prepared him for a track. And, as I was tracking behind the Esso station it was an abandoned car lot and places like that, high weeds, and banks, and excavation work being taken place, I injured my dog by falling over some high embankment, and on my way back from that location to meet my partner with my dog, he pointed out to me that a suspect had just come out from the area from which I just came from.

I put the dog in the cruiser and went across the highway from South Capitol, down Suitland Parkway and at that time we apprehended the suspect.

Q. Now, I want to take you back a few steps. You said that there

82 were a number of squad cars and other police that all converged at the gas station? A. That is correct.

Q. Did you know where these other squad cars were from? A. Several of the cars were from No. 11 Precinct and I believe there was two robbery cruisers there.

Q. Before you proceeded to track with your dog, was a discussion held at the gas station among the officers there? A. Not to me.

None other than that the suspect had left the cab and went a certain direction behind the filling station. That is all I knew about the discussion.

Q. Where did you go to track - and then you went and spotted the individual that you had tracked? A. That is right.

Q. You said you spotted him. Then what happened? A. Well, I got out of the cruiser when I saw this suspect and called to him to stop, went to the suspect, and he stopped, and I immediately frisked him down and found that he had a toy revolver on him and a large amount of change.

I think -- my partner then notified headquarters that we had a suspect that had a revolver and a large amount of money on him, and in a matter of a few minutes the other cars responded on the scene and I turned the suspect over to the robbery squad.

83 Q. At any time during this period when you were investigating this call at South Capitol Street, were you given a description of this suspect? A. It was a general description; yes.

Q. Now, did you use this description in any way with regard to your other duties? A. I don't understand, sir.

THE COURT: I don't know what "general description" means.. He has used that term twice.

BY MR. SCHROEDER:

Q. What do you mean by general description? A. General description, I mean, for instance three colored males, their ages from 25 to 30; medium build; weighing approximately 150 to 160 pounds; six feet of height; and the clothing they wore, dark clothing; light clothing.

In this particular instant one of the lookouts read, I recall, it had a light trench coat and the suspects were about six feet tall, weighing 150 to 170 pounds.

Q. And this was the description given at the Old Hickory House? A. Yes.

Q. In that connection? A. Yes sir.

Q. Did you have a description in connection with the suspect in-
84 volving the call from the taxicab driver? A. No, I did not.

Q. Did you yourself search the individual you arrested? A. Yes, I did.

CROSS EXAMINATION

BY MR. JONES:

Q. Officer, were you present when this man was booked on this charge, on the charge of robbery of the Old Hickory House? A. No, sir, I wasn't.

Q. Do you know when he was booked? A. No, I don't.

Q. Well, did you accompany him when you went to No. 1 Precinct? A. Yes. Not in the same cruiser, I wasn't.

Q. He was not booked at that time, was he, when you got to the No. 1 Precinct? A. At that particular time, no, sir.

Q. And how long were you in his presence after you arrived there? A. About four hours, I would say.

Q. And during that period was he booked for that, or on that charge? A. Well, the technicality of did I see him being booked, no, I did not.

85 Q. Do you know if he was booked during that four-hour period of time? A. No, I don't know about that.

Q. Now, you talked to a Miss Wilson, didn't you, a waitress in the restaurant? A. No, sir, I didn't.

Q. Well, which waitress did you talk to, to get this description, this general description which you refered to? A. I didn't talk to any of the waitresses.

Q. Then where did you get the general description? A. From the radio flash in the cruisers.

Q. Do you recall one description or one lookout saying that one man had a very noticeable chipped tooth? A. No, sir.

Q. And the description that you had from the radio flash, as you recall it, then, was a lookout for three Negro males in mid-twenties, of medium build, weighing, did you say, 160 pounds? A. That is

correct. From what I can remember. It has been so long. That is why it is generally, I am speaking in general terms. I don't remember the exact --

Q. This is just to the best of your recollection? A. That is correct.

Q. Officer, you mentioned there was some woods behind this gas
86 station?

THE COURT: Wood, did you say, or woods?

MR. JONES: Woods.

THE WITNESS: I didn't say it was woods, sir.

BY MR. JONES:

Q. Well, can you describe the countryside behind that gas station? A. It was a lot with abandoned cars in it, high grass, and excavation work being done.

Q. And was that where you arrested this suspect? A. No, sir.

Q. Where did you arrest him, exactly? A. Alongside the parkway, Suitland Parkway.

Q. Right alongside the parkway? A. It was about 25 yards off the pavement I would say, 20 yards.

THE COURT: 20 yards from what?

THE WITNESS: From the highway surface.

THE COURT: And how far from the gas station?

THE WITNESS: Approximately one hundred yards, your Honor.

BY MR. JONES:

Q. You were on duty that night, Officer? A. Yes.

87 Q. Were you aware of how many other robbery calls came in? A. At that time?

Q. Yes; on that evening. A. If I can remember correctly, there wasn't any more up to that time that we had received a lookout for robbery at 2 o'clock -- approximately 2 o'clock in the morning.

Q. You mean that was the only robbery that -- A. That is correct, to my knowledge.

That we responded, in our area, and we cover half the city in our cruiser.

Q. I don't mean the one that you responded; I mean just the ones that came in whether or not you responded. There were others, weren't there? A. I can't recall on that. In our location there wasn't any more.

MR. JONES: Nothing further at this time, your Honor.

CROSS EXAMINATION

BY MR. MC GRAIL:

Q. Officer, you referred to a 6 -- when you were describing this general description you received over the cruiser radio, you mentioned a six-footer. Were you referring to a six-foot man? A. Yes.

88 Q. As one of the three men? A. Yes; as one of the three.

Q. What description -- A. Generally the purpose, as I can remember the lookout, as being six foot in height.

Q. And what was the indication as to what that man was wearing? A. That six-foot individual?

Q. Yes. A. I can't remember the exact description of the lookout now; no, sir.

MR. MC GRAIL: Thank you. That is all.

REDIRECT EXAMINATION

BY MR. SCHROEDER:

Q. Do you recall who gave you the order to go into the field to track the suspect? A. No direct order to do this. A suspect had fled and it is my job to try to apprehend him with the dog, and that is what I did.

Q. Do you recall what that suspect was wearing at the time you arrested him? A. Yes, I do.

Q. Would you describe that -- could you describe his wearing

89 apparel at that time? A. Yes.

Q. Would you tell us what it was? A. It was a light trench coat. He had a light trench coat, a dark brown hat on, and a white shirt.

RECROSS EXAMINATION

Q. Officer, you said that that dog was injured? A. That is correct.

Q. That is, someone tripped over the dog? A. I injured my own dog, sir.

Q. So that that dog didn't actually -- did he actually reach the suspect? A. No, sir.

Q. Or did you trip over him before? A. Before.

Q. So that he didn't succeed in tracking that suspect down to the final point where you placed him under arrest; that dog didn't? A. That is correct. I was in the area in which my partner had seen the suspect come out of. When I left the area with my injured dog and brought him back to the cruiser across the highway.

Q. Was that the only dog that went out of the car? A. That is right, sir.

90 MR. SCHROEDER: Nothing further.

THE COURT: When did you first see this man you arrested?

THE WITNESS: Alongside the highway.

THE COURT: When you were at the gas station?

THE WITNESS: No, after --

THE COURT: Or after you left the gas station.

THE WITNESS: After I left the gas station I proceeded on to track, and I crossed the highway, went into the excavation area, and I was on my way back and my partner met me on the highway and I put my dog in the car, and at that time he pointed out to me that where I had just left, the area where I had just left, that a suspect had just come out of it.

THE COURT: And you had not seen the suspect?

THE WITNESS: No, sir. Until that time --

THE COURT: Well, then, did you see him?

THE WITNESS: Yes, I did.

THE COURT: And then you drove toward him?

THE WITNESS: Yes, sir.

THE COURT: And called to him to halt?

THE WITNESS: Yes, sir.

THE COURT: And what did you take from him?

THE WITNESS: A toy revolver, Your Honor.

91 THE COURT: What do you mean, something that a child uses, or one of these --

THE WITNESS: Yes, sir. It resembles a policeman's 38 snub-nose.

THE COURT: And what else?

THE WITNESS: That is all I took off of the person at that time, in the fast frisk, as an arm. There wasn't any other weapon.

THE COURT: Then what did you do with it?

THE WITNESS: Turned it over to Detective-Sergeant Fagon of the robbery squad.

THE COURT: When?

THE WITNESS: Two or three minutes after.

THE COURT: Back at the gas station?

THE WITNESS: No, sir; at the scene on the highway.

THE COURT: He came up then, did he?

THE WITNESS: Yes, sir.

THE COURT: He was not your partner?

THE WITNESS: No, sir.

THE COURT: Do you see that man in court today, the man that you arrested?

THE WITNESS: Yes, sir.

THE COURT: Don't you want some identification?

MR. SCHROEDER: Would you identify the man you arrested within the area you just described?

92 THE WITNESS: Shall I point him out, sir?

THE COURT: Stand down and put your hand on his shoulder.

THE WITNESS: This is the man I arrested. (Touching shoulder.)

THE COURT: Very well.

MR. SCHROEDER: May the record reflect the officer identified Paul Gatlin?

THE COURT: Yes.

(Witness left the stand.)

MR. SCHROEDER: Detective-Sergeant Wayland Fallin, of the robbery squad.

Thereupon,

WAYLAND H. FALLIN,

a witness, called by and on behalf of the Government, being first duly sworn, was examined, and testified as follows:

DIRECT EXAMINATION

BY MR. SCHROEDER:

Q. State your name and duty assignment, please. A. Detective-Sergeant Wayland H. Fallin, assigned to the robbery squad, Metropolitan Police Department.

Q. How long have you been on the force, Sergeant? A. 21 years.

93 Q. How long with the robbery squad? A. A little over four years.

Q. Were you on duty the early morning of November 8, 1962? A. I was.

Q. Did you have an occasion to respond to a call at the Old Hickory House restaurant on that morning? A. I did.

Q. Would you give us the details of that call? A. I was in a cruiser, headquarters cruiser, and we got a call to respond to the Hickory House restaurant on 8th Street Southeast at K, for a robbery and holdup.

Q. What time did you receive this call, if you recall? A. It was about 2 o'clock, a.m.

Q. And then what did you do? A. We went to the restaurant and there we met the uniformed officers who had gotten there prior to us, and we proceeded to get the detailed report of the incident.

Q. Did you get a description of the individuals who robbed the restaurant? A. Yes, we did.

Q. What did you do next? A. The uniformed officers flashed a lookout for --

Q. Now for clarification, when you say "flashed a lookout," what
94 do you mean? A. By radio. Flashed a lookout by radio and made a written report of the incident.

Q. What does this radio message consist of? A. It consists of a lookout for the suspects who held up the place, and it has a description.

Q. Then what happened? A. After that we got our report and we left.

Q. Returned to the robbery squad? A. No; we continued cruising on the streets.

Q. Did there come a time when you got a call to respond to a gas station at South Capitol Street and Howard Road? A. Howard Road that is; yes. We did.

Q. Can you tell us what brought that about? A. The radio dispatcher came on and stated that -- well, he ordered a car, I believe, from No. 11 precinct to respond to Howard Road and South Capitol Street, to the gasoline station, that a cab driver was there, and the cab driver had notified the police that he had three suspicious subjects in his cab and he wanted to know if there had been any lookout for any such subjects, for any crime earlier that evening or day.

Q. Did you receive a description of any of the individuals from the cab driver? A. No, I didn't. We responded in person.

95 Q. When you responded, was a description given of it? A. Yes. The cab driver gave a description of three subjects that fit the general description of the lookout that we had flashed of the holdup on 8th Street at about 2 o'clock. This was about 2:40 a.m. when we responded over there.

Q. Then what did you do after you had arrived at the gas station at the time the cab driver was there? A. After we were satisfied of the description that was sent to us, two officers from the Canine Corps responded also, and several other units from the department. The

Canine Corps, after learning from the cab driver the direction of escape of one subject as he fled from this cab, proceeded to run a track in the direction of escape, and we stayed around maybe 15 or 20 minutes, and there had been no results, so we left.

Q. At what time would this be now when you left? A. Well, I would say it was about maybe 3 o'clock we left.

Q. Then what happened? A. And about 3:40 a.m. we received another call which was put out by the Canine officers who responded that they had sighted and were about to apprehend a subject in the area fitting the description for which they were looking. We again respond-
96 ed, and at that time the Canine officers and other units had responded also, and they had in custody one of the defendants here.

Q. Do you see the defendant whom they had in custody? A. Yes, I do.

Q. Would you point him out for us, please? A. That is the one on this end, sitting on this end, there.

Q. Would you tell us what he is wearing? A. At the time of the arrest --

Q. No; now.

THE COURT: He means now. Just for the purpose of identification.

THE WITNESS: He is wearing a -- looks like a brown suit there and brown tie, white shirt.

MR. SCHROEDER: May the record reflect the officer has identified Paul Gatlin.

THE COURT: Yes.

BY MR. SCHROEDER:

Q. Now you responded to the gas station once again? A. Well, no; the last time we responded, about a city block distance from the gas station along the Suitland Parkway.

Q. Do you recall what time you arrived at this point? A. Yes, I do. It was about 3:40 a.m.

97 Q. Then what happened? A. The Canine officers had the subject

in custody, and we proceeded to search him, with them, and we took him to police headquarters, the Robbery Squad.

Q. Do you recall what time you took him to the Robbery Squad, and what time you left the place where the arrest was made? A. We only stayed there about five or six minutes, I suppose.

Q. So it would be approximately what time? A. Well, it was around 3:40, 3:45 when we left there, and transported him to headquarters in the robbery cruiser.

Q. What time did you arrive at the robbery squad? A. I got some notes here on it. I don't remember the exact moment of time, but I have a time log that I made up.

Q. If you were to refresh your recollection, -- would you be able to refresh your recollection by looking at your notes? A. Yes. I have it with me.

THE COURT: You may look at them, of course, when he gets into this portfolio, the other side has an opportunity to look at it.

MR. SCHROEDER: I have no obejction to that.

THE COURT: I know, but it will prolong matters.

98 Proceed, Officer.

THE WITNESS: Yes, sir.

We left the robbery squad, police headquarters at approximately 4:05 a.m.

BY MR. SCHROEDER:

Q. And what did you do at that time? A. At that time we counted the money that we took from the defendant.

THE COURT: Now you say you took. When did you take the money?

THE WITNESS: We took the money from him -- we took part of the money from him at the scene of the arrest, and the rest of it at headquarters, from his pocket.

BY MR. SCHROEDER:

Q. Did you take anything else from him at the scene of the arrest? A. A gun.

Q. Can you describe the gun? A. Yes; it was a toy, a toy gun, made to resemble a small automatic.

THE COURT: If he identified it in any way, don't you think you better have it identified now?

MR. SCHROEDER: Well, your Honor, I felt I could do it when the jury was back, but if you prefer, I can do it now.

99 THE COURT: Well, I think you had better have it all in now.

Did you put your initials or something on it to identify it, Officer?

A. I think I did, your Honor. I would have to look at it first.

MR. SCHROEDER: May I have this marked Government's Exhibit 1?

THE COURT: Yes.

(Government's Exhibit Number 1 marked for identification.)

BY MR. SCHROEDER:

Q. I show you what has been marked Government's Exhibit 1 and ask you if you can identify that gun, Sergeant Fallin? A. Yes, I can.

Q. How do you identify it, sir? A. By my initials.

Q. Your initials are where? A. Appear on the frame, "W.H.F."

THE COURT: And that is the one you took from this defendant?

THE WITNESS: That is it.

BY MR. SCHROEDER:

100 Q. You took this from him at the time of the arrest? A. Yes.

Q. Do you recall how much money, total, was taken off the person of the defendant? A. I have that here, too. It was $47.19.

Q. Now, while you were at the robbery squad with the defendant, what procedure did you follow? A. Well, we was in the process of making up papers and talking to the defendant.

THE COURT: Making up what?

A. Papers. Making up papers.

THE COURT: All right.

THE WITNESS: And we talked to the defendant, and the defendant was under the influence of intoxicants, or appeared to be under the influence of intoxicants.

We talked to him until about 4:20 a.m.

BY MR. SCHROEDER:

Q. Officer, when you say he appeared to be under the influence of intoxicants, was he under the influence to the extent that he was incoherent? A. No. He was slow in his answers. He wasn't drunk, I would say, but he was definitely under the influence of intoxicants.

Q. Did he have control of his faculties? A. Yes.

101 Q. Would you say he was aware of what he was doing? A. Yes.

Q. At any time while you had him at the robbery squad office did he make any statements to you? A. Yes, he did.

Q. What were those statements?

THE COURT: Let's find the time.

BY MR. SCHROEDER:

Q. And give us the time of the statements. A. 4:20 a.m.

At 4:20 a.m. he stated to me that he had been involved with two others in a holdup of a restaurant on 8th Street, Southeast, known as the Hickory, or Old Hickory -- whichever it is -- and that they had gone in there, two of them, and he had stood at the door. He said after the holdup they came out and they run around to 9th Street and got into a car that he was driving, a Ford.

He said they drove to 11th and M Streets, Southeast, at which time the voltage regulator went out and he had to leave the car.

He said they caught a cab and -- no; he said that two of them caught a cab and left, and that he walked from there, 11th and M Streets, Southeast, west on M Street to South Capitol, and south on South Capi-

102 tol across to South Capitol Street bridge to the point where he was apprehended.

Q. Just for the record, you say you arrived at the robbery squad office at what time? A. About 4:05, I believe it was.

Q. And you say these statements just iterated were made by the defendant at what time? A. 4:20 a.m.

MR. SCHROEDER: I now offer this gun into evidence.

THE COURT: It will be received.

(Government's Exhibit Number 1 was received in evidence.)

THE COURT: Now he has spoken about the robbery of the Old Hickory restaurant.

Did he say anything about any robbery at the store of Sher W. Lee?

THE WITNESS: No, sir.

THE COURT: All right.

MR. JONES: Objection on the grounds of --

THE COURT: You object to it?

MR. JONES: Yes, your Honor.

THE COURT: On the ground that there was not probable cause for the arrest?

MR. JONES: Yes, sir.

103 THE COURT: Well, I will receive it and you can make your motion, and the whole thing will go out. This is not before the jury. If I should rule in your favor, it will all go out.

MR. JONES: I realize that, your Honor, but I just didn't want to have it offered in evidence without my being able to question --

THE COURT: It is being received in evidence for the purpose of this voir dire examination and for no other purpose.

THE WITNESS: Very well, your Honor.

BY MR. SCHROEDER:

Q. Then what occurred after the defendant made the statements? A. The defendant, after that, involved other people with him. Named other people that was with him. And told me where we could possibly find him.

Q. Did you proceed to follow up this lead? A. I did.

Q. What did you do? A. At 6:50 a.m., I think it was -- yes; at 6:50 a.m. he directed us to 1114 Eaton Road, Southeast, and stated that Dennis O. Miller, who had accompanied him on this robbery, was there, and that he had a gun, and that he would use it.

104 We went to 1114 Eaton Road, Southeast, several officers, and we proceeded to look for Dennis Miller.

I covered the front of the building while others went inside and a few minutes later they came out with Dennis Miller in custody.

Q. Then what happened?

THE COURT: Well, let's find out.

Do you see Dennis Miller in court?

THE WITNESS: Yes, I do.

THE COURT: Will you point him out, please?

THE WITNESS: He is the defendant or subject, sitting next to the last man at the table?

THE COURT: What is he wearing?

THE WITNESS: Brown sweater.

THE COURT: Very well. The record will show he has identified the defendant Miller.

BY MR. SCHROEDER:

Q. Then what did you do after he was taken in custody at that address? A. The officer came out with him in custody, and he also had a gun and a shoulder holster he gave to me. We transported Dennis Miller to headquarters, the robbery squad.

MR. SCHROEDER: I would like these marked Government's Exhibits 2 and 3.

105 THE COURT: Very well.

(Government's Exhibits 2 and 3 were marked for identification.)

BY MR. SCHROEDER:

Q. Officer I now show you what has been marked Government's Exhibit 2 and 3, and ask you if you can identify them. A. Yes. I identify this gun, and this holster as the ones the officer gave me and stated he took from the vicinity of where he was arrested.

Q. How do you identify them, sir? A. By my initials.

Q. Government's Exhibits 2 and 3 were taken from the defendant at the time of the arrest, were they? A. That is right.

Q. Then what happened? A. We got to the precinct --

Q. Wait. What time was this arrest made, if you recall? A. This was 6:50 a.m.

THE COURT: On Eaton Road?

THE WITNESS: Eaton Road, yes. 1114, sir. We got to the police headquarters about 20 minutes later.

BY MR. SCHROEDER:

Q. Which would be approximately what time, sir? A. Would be
106 about 7:05 or 7:10. We advised Miller of what the defendant Gatlin had said with regards to the holdup on 8th Street, at which time Miller admitted --

THE COURT: What did he say?

MR. SCHROEDER: And what time was this?

THE WITNESS: This was about 7:15.

THE COURT: Now, don't say "admit." State what he said. "Admitted" is a conclusion.

THE WITNESS: All right, your Honor.

BY MR. SCHROEDER:

Q. Did he say anything to you at this time, sir? A. Yes. He stated that he had been with -- no; I am sorry.

He stated that he had held the place up by himself.

Q. Which place was this? A. That is the Old Hickory restaurant.

THE COURT: Held it up by himself?

THE WITNESS: Yes; by himself. He said there wasn't anyone with him; he went in there by himself; he had been in there numerous times before; and he described about three people being on duty there, and he stated he went in by himself and that he jumped over the counter, and that he took an unknown amount of money.

BY MR. SCHREDER:

107 Q. Did he state whether he had said anything to anybody in a restaurant? A. No, he didn't.

Q. And then what did you proceed to do? A. With that, of course, we started notifying complainants to report to the robbery squad, for the purpose of a lineup.

* * * * *

108 Q. At the time you were talking to the defendant Miller and he made these statements to you, did he appear to have control of all his faculties? A. Yes, he did.

Q. Were any promises made to him? A. No, sir.

Q. Was any coercion used? A. Oh, no.

* * * * *

109 CROSS EXAMINATION

BY MR. JONES:

* * * * *

114 Q. Now, what was the time when you first saw this defendant on that evening? A. The first time?

Q. Yes. A. The first time was about 3:40 a.m.

Q. And where was that? A. It was about a city block distance from the gasoline station which is located at Howard Road and the Suitland Parkway or South Capitol Street.

Q. So he was somewhere in the area of that gas station for one hour? A. I don't know that.

Q. Where did you transport him then, to police headquarters? A. Yes, sir.

Q. And you arrived there at 4:05; is that right? A. Approximately 4:05.

Q. Then you said you had to fill out some papers. What papers were those? A. We have to make up a lineup sheet; a statement of facts, we have to take some statements from the defendant.

Q. Would it have been any later than 4:05 that he got into that

115 police station? A. No.

Q. No later? No earlier? A. I don't think so.

Q. And 15 minutes later he made this statement; is that right? A. Approximately that, sir.

* * * * *

Q. Will you tell us again exactly what he said, to the best of your recollection? A. He stated that early -- earlier that night he stated

that he had been involved in a robbery at the Hickory Restaurant -- I believe he described it as the Hickory Restaurant on 8th Street, Southeast, to the extent that he, with two others, had gone there with intentions of robbing the place.

* * * * *

116 Q. And yet you didn't arrest them until -- you arrested Miller, I believe, at 6:50 and his brother at 6:10? A. Whatever is on that sheet; yes, sir.

Q. What was the reason for that delay? A. The reason for that delay was we couldn't find Miller. We went to several places first.

Q. Well, didn't the defendant tell you where he was? A. Finally.

Q. Finally? A. Finally.

Q. In other words, he didn't tell you at 4:20 -- it was some time after that? A. He told us who it was but he took us to his employer who was staying there. We went there and looked for him. We went to several other places to look for him before finally he told us he might be at his girl friend's house.

Q. Isn't it a fact, Officer, that he did not even know this man's last name? A. No, it is not.

117 * * * * *

Q. He didn't say anything. The first statement he made was a full and complete admission; is that right? A. That is right.

* * * * *

120 CROSS EXAMINATION

BY MR. MC GRAIL:

Q. You stated , Officer, that the defendant Gatlin, after you arrested him and when you interrogated him, named two others who were allegedly involved in the Hickory restaurant holdup; is that right? A. That is right.

Q. Do you recall previsely what the statement was that the defendant Gatlin made to you? A. He stated that there were two others, and one of them he stated his name was Dennis Miller. And he gave us several names for the second subject, whom I have never been able

to determine who it was, that was involved with him.

Q. So as best you recall, he made a statement to the effect

121 that there were two others involved and one was Dennis Miller?

A. That is right.

Q. And you are sure of that now? A. I am.

Q. And you are sure that he stated Dennis Miller? A. That is right.

Q. He didn't use a nickname? A. Not that I recall, no.

Q. And did he use Miller? A. Yes.

Q. Now, are you relying on any notes you have for that testimony or do you recall that independently? A. I recall that independently.

* * * * *

122 Q. You stated that you went to find defendant Miller; is that right?

A. That is right.

Q. And who was with you when you went to find Miller? A. I was with my partner, Sergeant Green from the robbery squad, Detective-Sergeant Gray from the safe squad; Detective Oliva from No. 1; Detective Oliva's partner from the sex squad -- I don't recall what his name was now; and a couple of uniform officers from the 11th precinct.

Q. How many cars did you have? A. Four. At least four.

Q. Was Gatlin with you? A. Yes.

Q. Where did you go? A. Left headquarters. The first stop I think we made was on Pomeroy Road, Southeast, about three blocks' distance from 1114 Eaton Road, where Dennis Miller was finally arrested.

123 Q. Why did you go there? A. Because he stated that he was employed by a man who had a truck.

Q. "He" stated? Who is "he"? A. Gatlin stated that Dennis Miller was employed by an individual who lived on Pomeroy Road in an apartment, and that he might be there; that they had met there earlier in the evening before the robbery, and had some discussions

there, and that is where he might be sleeping. We went there and he was not there, the man was not there, his son was home, he had gone to work.

Q. I am sorry; you say -- the son was what? A. His son was there; a young 17-year-old boy.

Q. Did you go in the house? A. Yes, we did -- an apartment.

Q. What? A. An apartment.

Q. Did you knock on the foor first? A. Yes.

Q. Who opened the door? A. The young man.

THE COURT: Who did?

THE WITNESS: The gentleman's son; that Gatlin directed us to this home, 1700 Mill Lane.

124 Q. Who approached fim first; you or one of the other officers? A. I was with them.

Q. What was said when the door was opened? A. We asked if his father was home.

Q. What else? A. He says no. We asked him if Dennis Miller was there. He said no.

We asked him if we could look around and he said yes.

We went in the apartment and looked and there was no one in there but the young man.

Q. Did you take anything out with you? A. Did I take anything out with me?

Q. Or any other police officer? A. I think one police officer found some .32 caliber bullets in there.

Q. And he took them? A. Yes.

Q. Did you ask permission of the boy before you took them? A. Ask permission? I believe he just took them.

Q. Just took them? A. Yes.

Q. Where did you go to next? A. As well as I recall, next we

125 went to Paul Gatlin's house.

Q. Did you go in there? A. Yes.

Q. What was your purpose in going in there? A. To talk to his mother.

Q. And Gatlin was with you? A. That is right.

Q. And did you talk with his mother for a while? A. Yes, we did.

Q. Then where did you go? A. I think the next place we went to was Eaton Road, the home where we arrested Miller.

Q. Now wait a second. Are you sure that the first house on Eaton Road that you went into was the one where you found Miller? A. I said I think it was; I am not sure. We went to several places.

Q. Well, what are the others other than the first one you mentioned where a 17-year-old boy answered, and Gatlin's mother's home. Where else did you go?

Did you go to Burney Place? A. To where?

Q. Burney Place. A. That may be where the boy lived. I thought
126 it was Pomeroy Road. That may be where the boy lived, on Burney Place. I am not sure.

That may be Burney Place where the old man lived who was Dennis Miller's employer.

Q. What was the address on Eaton Place where you found Miller? A. 1114.

Q. Didn't you go into 1110 first? A. I don't know.

Q. You don't remember, you mean -- A. No.

Q. Do you know where Miller's mother lived? A. No, I don't.

Q. You don't know whether you went in her house? A. I don't recall.

Q. Now, you went into -- did you go inside of 1114 Eaton Road where you found Miller? A. No, I did not.

Q. You stayed outside? A. I did.

Q. Did you have a warrant for the arrest of Miller at that time? A. No, sir.

127 Q. Did you have a warrant for the search of the premises at 1114 Eaton Road? A. No, sir.

Q. Did you have a warrant for the search of the premises back where the 17-year-old boy answered, the home or apartment of the alleged employer of Miller? A. No, sir.

MR. SCHROEDER: Object.

THE COURT: I sustain the objection. You haven't offered the cartridges, have you?

MR. SCHROEDER: No, sir.

BY MR. MC GRAIL:

Q. You stayed in the car when some police officers went into 1117 Eaton Road; is that true? A. No; I stood out and covered the car at 1114 Eaton Road.

* * * * *

132 JOHN A. ALLEVA

a witness called by and on behalf of the Government, being first duly sworn, was examined, and testified as follows:

DIRECT EXAMINATION

BY MR. SCHROEDER:

Q. Sir, would you state your name? A. Private John A. Alleva.

Q. How long have you been on the Metropolitan Police Force, sir? A. Approximately 12-1/2 years.

Q. Directing your attention to November 9, 1962, were you on duty that day? A. Yes, sir.

Q. Did you have occasion to assist in the arrest of one Dennis O. Miller? A. Yes, sir.

Q. Do you see Dennis O. Miller here in the court room now?

133 A. Yes, sir.

Q. Would you point him out for us, please? A. The one in the brown sweater there.

MR. SCHROEDER: May the record reflect that the detective has identified the defendant Miller?

THE COURT: Yes.

BY MR. SCHROEDER:

Q. Would you give us the details concerning the arrest, as you

know them, of the defendant Miller? A. Well, approximately around 6:30 I was in the back of this house where Mr. Miller was, and a couple other officers were in the front, and the woman who lived there let us in the back entrance -- said that --

Q. Let me interrupt you a moment.

Did you receive a call to respond to this address? A. Yes, we received a call.

Q. And where were you directed to respond to? A. I don't remember the address.

Q. Do you remember the name of the street? A. I believe it was Eaton Road.

Q. Do you recall what time you received this call? A. Not too well, no. It was because the events were very heavy that morning.

134 Q. What time did you arrive at your destination? A. About 6:40 or something like that.

Q. Then what occurred? A. The woman let us in the back door; she said she could not get the front door open, that the door was broken. And myself and a couple other officers went in the back way, and we asked if Miller was home, and she told us no.

So at that time I asked her what happened to the front door, and she said that it broke. So one of the officers went over there and the front door was barricaded.

So we proceeded to search the place. And we went upstairs in a bedroom and we found nothing there, and I happened to look up in the hallway there, this short hallway, and it has one of them transoms, a sort of a small opening with a cover on it that leads to the attic upstairs, and it has a piece of wood covering it.

Well, the wood wasn't sitting right. Because I have one in my own home and I know how they sit. It is supposed to sit flush on its moulding all around, and this one was not sitting flush.

And then I looked on the ground and I saw some of this insulation that they use to coat your attic with, and some of that was on the floor. So I figured he was right up there.

An I climbed up onthe top of the railing -- it is a different type
135 of railing in them homes there; it is a solid railing about six inches wide, where you can stand on real good without any trouble -- and I put my hand up to the wood that would be the cover to the transom, and I couldn't move it.

Well, ordinarily you just have to touch it and it opens right away, and I really gave it as much strength as I could, and I couldn't budge it, and then I knew somebody was on it. And I told him to come on down, and he came on down.

Q. Now, you say he came on down? A. Yes, sir.

Q. Who was this? A. Mr. Miller.

Q. The gentleman you have previously identified? A. That is correct.

Q. Then what did you do? A. I asked him where the gun was, and he said he didn't see it -- didn't see any. Didn't have any; let's put it that way.

Q. What prompted you to ask him that question? A. Well, if I remember right, I was told that he had a gun, and at that time he said he didn't have any and there was none up there.

And laying on the floor was one of them old-fashioned springs that
136 has the bars on them -- do you know what I mean?

Q. No, I don't. A. An all-metal spring to a bed.

Q. Oh, that a mattress sets on? A. Yes.

Q. A bed spring? A. Yes. And I got that and laid it up against the wall, and I climbed into the attic, and I didn't have to go inside because right there -- it is hard to explain. That opening is about as wide as 24 inches, and you have a moulding and then you have a 2x4 box affair all the way around it.

Well, right on the side of this -- something similar to this. You would go up in the attic, and right there you would have about a 3-inch drop before you would hit the insulation. And then I looked in there, and there was the gun laying right there.

Q. I now show you Government's Exhibits 2 and 3, which have been admitted in evidence for this hearing, and ask if you can identify them. A. Yes. This is the gun.

* * * * *

137 Q. And what time would you say it was when you brought the defendant Miller down from the attic? A. Well, about that time I would say it was about 6:50. I am not sure of the time. It was -- like I say, it was a real exciting morning there.

Q. 6:50 would be your best recollection of the time? A. About that, yes.

* * * * *

141 CROSS EXAMINATION

BY MR. JONES:

Q. Officer, did you see the defendant Gatlin that morning? A. I don't believe so.

Q. You don't recall seeing him that morning? A. No, I don't recall seeing him.

CROSS EXAMINATION

BY MR. MC GRAIL:

* * * * *

143 Q. In other words, these other two officers took custody of Miller? A. That is correct.

Q. And they took him out to the cruiser, didn't they? A. Well, after I come down, we took him out to the cruiser, yes.

Q. They stood by waiting while you searched the attic; correct? A. That is correct.

Q. Were you the first one in the house? A. I couldn't honestly say. There was three of us in the back of the house, and I don't know which one of us was first.

Q. Did you just open, turn the knob, and push the door, or was the door locked? A. No; the woman opened the door and let us in.

Q. Did you ring the doorbell? A. In the back they don't have no doorbell.

Q. What did you do? A. We knocked on the door in the front, like I said, and she told us that the front door doesn't work, and --

Q. Did you identify yourself? A. Oh, yes.

144 Well, we have two uniform policemen, if I remember right, or one uniform policeman with us at the time, and we also identified ourselves.

Q. When you knocked at the door did she speak through the door, first to you, before you spoke to her? A. She didn't speak to me first. Like I said, I was in the back door. When the officers knocked on the front door, she told them that the door was not operating, to come around back, so one of them came around and said the front door was not operating, was not working properly, and she couldn't open it.

Then she opened up the back door.

Q. At that point when she opened up the back door, who spoke first? A. I don't remember.

Q. You had your gun drawn, didn't you? A. No.

Q. Did the other officers have any guns drawn? A. I don't remember. I didn't see any. I didn't -- I honestly don't recall whether they did. I imagine one of them did.

Q. But you don't recall for sure? A. No.

145 Q. If there were guns drawn before you went into that house? A. No; I don't remember.

Q. Then you went in the house and at that point were their guns drawn? A. I believe I took mine out when I heard somebody say the front door was barricaded; yes.

Q. And that was before the back door was opened; right? A. No; that was after we went in. We could not see the barricade on the front door unless we got inside.

Q. But you do not recall what was said when you first went into the house?

Do you know who the woman was who opened the door for you? A. No.

Q. You don't know her name? A. No.

Q. She did not identify herself? A. No. She might have afterward.

I didn't ask for any identification. I asked, if I remember right, after we were in there a while I asked if Miller was in here, and she said no.

Q. And she did not invite you in, did she? A. She opened up the door and let us in.

146 Q. Well, she opened up the door and you were able to get in, but she did not invite you in, did she? A. I don't remember whether she did or didn't.

Q. And was it after you got in the house that you said you were looking for Miller? A. Yes, I believe so.

* * * * *

REDIRECT EXAMINATION

BY MR. SCHROEDER:

Q. Did the lady of this house tell you you could not come in?

A. No, she didn't.

Q. Did she object to your coming in or searching the place?

A. No.

* * * * *

156 ROMOLO J. CARDINALE,

a witness called by and on behalf of defendant Gatlin, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. JONES:

Q. Would you state your name and assignment, please, Officer?

A. Romolo J. Cardinale, desk sergeant with the Detective Bureau.

Q. Would you state your duties as a desk sergeant? A. At the present, I am assistant to the ad -- administrative assistant to the Chief of Detectives.

Q. What were your duties on November 9, 1962? A. That would be station clerk.

Q. Were you on duty that day? A. Yes, sir.

Q. And in connection with being on duty did you make entries in an arrest book when defendants were brought into the police station and booked? A. Yes, sir.

157 Q. Now, would you open that book, please, to November 9th of last year?

THE COURT: Can you tell him the page? 82, wasn't it?

MR. SCHROEDER: 82, your Honor.

MR. JONES: Yes, 82.

BY MR. JONES:

Q. Now, Officer, do you see an entry beside the name Paul Gatlin? A. Yes, sir.

Q. Would you tell us the time that that entry was made? A. 11:30 a.m. November the 9th.

Q. Is that the earliest entry that you see with respect to the defendant Paul Gatlin? A. Yes, sir, it is.

* * * * *

158 Q. Now, would you look through that book, and look at all the entries made on November 9, and would you see if the defendant Paul Gatlin was booked on the complaint of, I believe it read of "Ionia Williams", or Miss. A. Williams of the Hickory Hut restaurant? A. Yes, sir.

Q. What time was that? A. 1:55 p.m.

Q. November 9th? A. Of November 9th.

THE COURT: 1:55 what?

159 THE WITNESS: P.M., sir.

* * * * *

CROSS EXAMINATION

BY MR. MC GRAIL:

Q. Officer, would you refer to the entries for Dennis O. Miller, please?

What is the first booking for defendant Miller? A. 11:32 a.m., November 9.

Q. For what charge? A. Charge of robbery.

Q. Is that the Goldstein? A. Yes.

Q. Is there another entry in your book respecting Miller? A. Yes, sir.

Q. And that is in respect to what robbery? A. Complainant Alta Williams.

Q. Of 922 - 8th Street, Southeast? A. Yes.

Q. And the date of the booking? A. 1:57 p.m. November 9, 1962.

160 * * * * *

CROSS EXAMINATION

BY MR. SCHROEDER:

Q. Sergeant, the process of your recording notations in that book, what is commonly referred to as "booking", it has nothing to do with the actual arrest itself, does it? A. No, sir.

Q. In other words, you were in no way concerned with the time the man was arrested, you were only concerned with the time the man was brought before you; is that not correct? A. That is correct.

* * * * *

164 PAUL W. GATLIN,

a defendant, being first duly sworn, was examined, and testified as follows:

DIRECT EXAMINATION

BY MR. JONES:

* * * * *

Q. Are you the defendant in this case? A. Yes, I am.

Q. Now, directing your attention to the morning of November 9, 1962, in the early morning, did you see any police officers at that time? A. Yes, sir.

Q. What time did you see them, approximately? A. They were -- it was approximately, I would estimate, around 3 o'clock.

165 Q. And where were you? A. On the Suitland Parkway going south toward, about three blocks from where I lived at that time.

Q. What were you doing at that time? A. I was walking home.

Q. Did you have a weapon with you at that time? A. Yes, I did.

Q. Where was it on you? A. I had it in my pocket, my coat pocket.

Q. Was it visible? A. No, sir.

Q. Did any of the police officers show you a warrant at that time? A. No, sir.

Q. Did they tell you at that time under what charge you were being placed under arrest? A. No, sir.

Q. And where were you taken? A. I was taken home -- no; I was taken to the precinct, Number 1 precinct.

Q. What time did you arrive there, do you recall? A. I don't know exactly. I wasn't on the Parkway long, so it was between 3 and 4. I would not say exactly, because I am not sure exactly what time it was.

* * * * *

166 CROSS EXAMINATION

BY MR. SCHROEDER:

* * * * *

181 Q. After you were taken down to the robbery squad did you say anything to the police with regard to certain robberies that were committed that night? A. No, I didn't.

Q. You didn't admit to the officers that you were involved in a robbery? A. No, I didn't.

Q. You didn't tell them your friend Dennis Miller was involved in a robbery? A. No, I didn't.

Q. Were you with Dennis Miller that night? A. I was with Dennis

182 Miller two or three times that day.

Q. Where? A. At various places.

* * * * *

Q. What were you wearing that night when the police arrested you on the parkway? A. I was wearing a brown suit and a khaki coat.

Q. Full length coat? A. Full length coat.

Q. Trench Coat? A. Khaki coat.

Q. By khaki you mean color? A. I mean khaki.

Q. Were you wearing a hat? A. Yes, I was.

183 Q. Were you wearing a white shirt, blue shirt? A. I was wearing a sport shirt.

Q. Sport shirt. Did you have a tie on? A. No, I didn't.

MR. SCHROEDER: Would your Honor indulge me a moment, please?

BY MR. SCHOREDER:

Q. Did you have a hat on, did you say? A. Yes, I did.

* * * * *

187 CROSS EXAMINATION

BY MR. MC GRAIL

Q. I believe you stated a few moments ago that you told the police you had been gambling earlier that evening; is that correct? A. Yes, I did.

Q. With the defendant Miller, among others; if that correct? A. Yes, sir.

Q. Now, did there come a time when the police took you in a cruiser and went over to find Mr. Miller? A. Yes, they did.

Q. Did they tell you why they were doing that? A. No, sir; they didn't tell me why. I was under the impression they was going over there to verify the fact that we were together gambling, because I had told them that him and I and several other people were gambling in the early part of the night together.

* * * * *

188 Q. And did you see the police go in the defendant Miller's house? A. Yes, sir.

Q. And do you know about how many police there were at that time? A. There was approximately ten or fifteen of them. There was quite a few of them out there.

Q. Did they surround the house? A. They surrounded the house and sent for a Canine.

* * * * *

207 THE COURT: Well, I am of the opinion that there was probable cause for the arrest of Gatlin and that therefore what was taken from Gatlin's possession, after searching him, and the statements should not be suppressed.

I have the same opinion in respect of the defendant Miller; and that therefore his statements should not be suppressed.

I prefer to believe the police version of this rather than the version given by the defendant, using the usual criterion for determining where the truth lies.

Now, we will bring the jury in and we can proceed with this case.

* * * * *

208 WAYLAND H. FALLIN,

a witness called by and on behalf of the Government, being first duly sworn, was examined, and testified as follows:

DIRECT EXAMINATION

BY MR. SCHROEDER:

* * * * *

211 Q. What did you do when you arrived at the gas station at South Capitol Street and Howard Road? A. When I got to South Capitol Street I met a cab driver and he described to me --

MR. JONES: Objection.

THE COURT: Don't state what he said.

You had a conversation.

BY MR. SCHROEDER:

Q. You had a conversation with the cab driver? A. Yes, I did.

212 Q. Did you then proceed to take further action? A. Also after this conversation, or during this conversation, members of the Canine Corps responded.

I also had a conversation with this subject, the cab driver.

Q. As the result of this conversation did you take any further action? A. Yes. A search was instituted in the immediate area for a subject whom the cab driver stated had fled from his cab when he pulled in there.

* * * * *

217 Q. Would you tell us what you did? A. Later that same morning I made a subsequent arrest of Dennis Miller.

Q. And where did this arrest take place? A. That arrest took place at 1114 Eaton Road, Southeast.

Q. And can you give us the approximate time of this arrest?

A. Well, as I recall it, it was 6:50 a.m.

Q. What role did you play in this arrest yourself?

Would you give us the details? A. I responded with several other units of the police department, and several other officers, and I myself covered the front of this address. It is a private home. I covered

218 the front door while other officers went inside of the premises and brought the defendant out.

MR. MC GRAIL: Before we move further, I would like to move to suppress any evidence respecting the arrest, for the reasons previously given, your Honor.

THE COURT: Yes. Overruled.

BY MR. SCHROEDER:

Q. With respect to the person arrested in Eaton Place, do you see that individual in the courtroom today? A. I do.

Q. Would you point him out, please? A. He is the second man from that end of the table with the brown sweater, I believe, on.

MR. SCHROEDER: May the record reflect the witness has identified the defendant Miller?

THE COURT: Yes.

* * * * *

221 CROSS EXAMINATION

BY MR. JONES:

* * * * *

223 MR. SCHROEDER: May it please the Court, at this time I would like to offer Government's Exhibit 1 in evidence.

MR. JONES: Objection, your Honor.

THE COURT: Overruled. It will be received.

BY MR. JONES:

Q. Detective Fallin, you said that the defendant Gatlin was intoxicated when you were in contact with him. What made you reach that conclusion? A. The odor of alcohol on his breath.

Q. Anything else? A. Yes. From my experience he was acting a little bit maybe sleepy.

Q. Did he act a little drowsy? A. That is right.

Q. Was he able to walk? A. Oh, yes.

Q. In a straight line? A. Yes, sir.

Q. Did you give him any kind of an intoxication test to determine whether or not he was intoxicated? A. No.

Q. Did you notice anything unusual about his speech? A. No; nothing, your Honor. It was a little bit thick.

* * * * *

224 Q. How far, if you know, is the Hickory House from the place where you first saw this defendant? A. That is about, I guess a mile and a half.

* * * * *

228 Q. Who else was there at the time that statement was made?

229 A. Sergeant Mark Gray from the safe squad; Detective Charles Lynn, L-y-n-n; of the robbery squad; and the two officers from the Canine Corps, Peter Ray and James H. Fallin.

Q. Is Detective Ray here today? A. No, sir.

Q. Is Sergeant Lynn here today? A. No, sir.

* * * * *

232 Q. Was he kept in that room in the robbery squad then until he was taken to the Commissioner and booked or arraigned? A. So far as I recall, yes, sir.

Q. And you were present when he was arraigned before the Commissioner; isn't that correct? A. That is correct.

Q. Would you recall what time that was? A. I think it was 1:22

233 p.m.

Q. So that he was taken to the Commissioner before he was booked on this charge; is that correct? A. Evidently, yes.

* * * * *

239 Q. Then you did not consider that statement completely reliable; is that right? A. Completely what?

Q. Reliable. A. All except one part of it at the time.

Q. I believe you said there were two parts which you doubted -- A. That developed at a later time.

Q. So that at the time you doubted one part and later on you came to doubt another part of it also; is that right? A. That is right.

Q. And one part that you came to doubt was that this man had stood by the door. A. That is correct.

Q. Now, didn't this defendant tell you that he had been gambling that evening? A. No, sir.

Q. Didn't he say that he had been playing dice with some other people? A. No; never told me.

Q. Didn't you ask him who he was with? A. Yes.

240 Q. When did you ask him who he was with? A. When I was questioning him just after 4:00 o'clock.

Q. And when you first questioned him he never said that he had been gambling with someone else; is that right? A. No, sir.

Q. So that the first statement that he made to you was this incriminating admission; is that right? A. Incriminating himself and blaming Dennis Miller.

MR. MC GRAIL: Your Honor, I object to that statement on the grounds it is hearsay and ask that it be stricken, and at the -- as a matter of fact I think --

THE COURT: Any objection to its being stricken?

MR. SCHROEDER: None, your Honor.

MR. MC GRAIL: I would like to add I think it is prejudicial and I would like to move for a mistrial at this time.

THE COURT: It will be stricken; the jury will ignore it.

Your motion for a mistrial is denied.

MR. SCHROEDER: I would like the record to show that the government did not elicit this information.

THE COURT: I understand you did not.

The jury will put that statement about Miller entirely out of their minds, because it is a statement made by somebody else not on the

241 witness stand.

BY MR. JONES:

Q. You were the first officer to question this defendant, weren't you? A. I was present, yes.

Q. Were you the first one that started? A. Yes. There were several of us there.

Q. How many officers were asking him questions? A. Three.

Q. Were those the other two officers you mentioned, Officers Lynn -- Sergeant Lynn and Detective Gray? A. Yes, sir.

Q. And you were all questioning him at once; is that right? A. We were all questioning him.

* * * * *

243 CROSS EXAMINATION

BY MR. MC GRAIL:

* * * * *

244 Q. And he was at home at 1114 Eaton Road, Southeast when you arrested him; was he not? A. He was at that address. I don't know whose home it was.

Q. And you had how many patrol cars? A. As well as I recall, we had three cruisers and one marked car, scout car they call them.

Q. And did you say you had about a dozen police officers? A. No, I didn't say that.

Q. How many would you say? A. Well, that makes eight that I could account for.

Q. They were all armed? A. Every one of them.

A. And they surrounded the house? A. Yes, sir.

245 * * * * *

Q. I don't want to ask you for any names but I want to ask you how many names the defendant Gatlin gave you when you were interrogating him regarding the Hickory robbery. A. He gave me at least four.

Q. At least four? A. That is right.

* * * * *

248 Washington, D.C..
Monday
February 11, 1963

* * * * *

249 JAMES H. FALLIN

called as a witness by the Government, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

* * * * *

252 BY MR. SCHROEDER:

Q. Just tell us what you did with this particular individual.

A. I searched the individual, and found that he was armed with a revolver and a large amount of money was on his person -- change.

Q. What time did this occur? A. This was approximately 3:30 in the morning.

253 Q. Then what happened? A. I radioed, I mean told --

Q. After you had apprehended the suspect? A. I immediately notified the communications that I had apprehended the suspect in Suitland Parkway.

* * * * *

254 CROSS EXAMINATION

BY MR. JONES:

* * * * *

Q. What time did you get the call? A. To South Capitol and Howard Road, you are speaking of?

Q. Yes. A. Approximately 2:30.

Q. Could it have been any earlier than that? A. I don't think so, no, sir.

* * * * *

256 Q. Now what did you do when you first got to the scene? Where did you park your car? A. Due to the excitement there, I couldn't say, sir.

Q. Anyone else in the car with you besides the dog? A. Yes; my partner.

Q. Who was that? A. It was my partner. Officer Ray.

* * * * *

257 Q. How large an area did you cover when you were tracking with this dog? A. About a 45-minute time limit, I would say I had tracked about a five-acre piece of property.

Q. Would you describe that piece of property? Was it bigger than this courtroom? A. Yes, it was.

Q. What was the terrain like? A. High grass.

258 Q. Any trees? A. Only very few trees. Little shrubbery-like trees.

Q. You would --

THE COURT: Let him finish his answer, please.

A. (Continuing) It wasn't a forest or large timber type trees. It was six-foot shrubbery. I guess they would be called trees.

BY MR. JONES:

Q. Were they thick trees? Did they have thick trunks? A. No.

Q. Did you have a light with you? A. Yes.

Q. And you shined this light around? A. Yes.

Q. Now, how long were you tracking this area with the dog? A. About thirty minutes, I would say.

Q. With the dog? A. Yes.

Q. Now, you said that at some point the dog became injured, is that right? A. That is true.

Q. What happened?

259 Q. Yes. A. How the dog was injured?

Q. Yes. A. I fell on the dog, striking the dog on the side, striking him.

Q. Finish your answer. A. I just finished.

Q. How long was that after you arrived there, that you injured the dog? A. About 25 minutes, or 30 minutes after I --

Q. And you had been tracking that area all that 25 minutes, is that right? A. That is true, yes. I stopped tracking once I injured the dog.

Q. And you had a light? You were using the light during that time too, is that right? A. That is true.

Q. Did you see any signs of anybody being there during that period of time? A. Yes, I did.

Q. What did you see? A. There was evidence of tracks in the dirt. The dog was tracking a person.

Q. But you couldn't see anything besides the actions the dog
260 engaged in, is that right? A. That is true.

Q. You couldn't see the tracks yourself? A. Yes, I could see that he was tracking, a person.

Q. Yes. But you could not see the tracks in the dirt yourself, is that right? A. Yes, I could see the tracks in the dirt. Or footprints in the dirt.

Q. And did you follow them yourself? A. No, I let the dog follow them. I rely on the dog to track, because I can't smell them.

Q. Now, how large did you say that area was that you covered? A. Approximately five-acre piece of property.

Q. And would you compare that with the size of this courtroom again? A. Five acres, twenty, thirty times, forty to fifty, a hundred times greater than this courtroom.

Q. The Suitland Parkway runs pretty close to that gas station, doesn't it? A. It does.

Q. Did you cross the Suitland Parkway when you were tracking? A. I did.

261 Q. You went on the other side of the parkway? A. Yes.

Q. Did you go on both sides of the parkway? A. Yes.

* * * * *

263 Q. If this man had been walking all that time, that you were searching for him, and he was walking at the same speed that he was walking when you arrested him, would it be accurate to say, in your estimation, that he could have gone to Maryland, I think you said? A. If he didn't stop on the way, I guess he could have.

Q. So that it must have occurred to you, Officer, that this man was not the same man that got out of the taxicab, isn't that a possibility? A. No.

264 Q. Then you assume that this man remained in that area for about an hour, is that right, while you were tracking? A. I don't know if he did or didn't, no.

Q. Is there any place that he could have hidden where you couldn't have seen him? A. Yes.

Q. Where? A. In this large area, yes.

Q. But there were no thick trees in that area, were there? A. No. But I had a light, in the night-time. If someone stayed in the proximity of me as I am tracking, a distance. In this high dirt piled up, bulldozer embankments.

Q. Your dog didn't identify this same man, did he, when you arrested him? A. I never try to identify the man after I arrest him with the dog.

Q. So the man that you arrested could have been a different man from the man that got out of that cab, isn't that right? A. I would say it could be, yes.

* * * * *

268 REDIRECT EXAMINATION

* * * * *

269 BY MR. SCHROEDER:

Q. Is that the point where the dog was hurt? A. Yes. And the time element from there back to the highway, I come back to the highway here -- in fact I come back out to the highway because I didn't want to go back through the terrain that I had been through. Come back this way. There had been a bulldozed roadway for trucks, it was

easier walking. I came back to the highway and come down here. I
270 saw my partner at the station. As I come out to the highway my partner pulled into the station. Where he had been at that time I don't know. He was patrolling the area. And I waited a flow of traffic to clear, and by the time I got across the highway, at that time he pointed out to me that as he came into the station -- I loaded the dog and came back out around South Capitol and apprehended the suspect approximately right along in here, alongside the parkway.

THE COURT: How far from the paved highway was it, you said?

THE WITNESS: I would say 15 or 20 yards, off.

THE COURT: Yards or feet?

THE WITNESS: Yards, Your Honor. About as far as from here to the jury.

THE COURT: Off the paved highway?

THE WITNESS: Yes.

THE COURT: Was he walking away from the gas station or toward it?

THE WITNESS: When I seen the defendant, after putting the dog in the car, he was walking parallel with the highway.

THE COURT: In which direction? East?

THE WITNESS: He was walking east, yes.

MR. JONES: Could you mark that with a crayon, the point
271 where he was?

THE COURT: Walking away from the gas station, not toward it?

THE WITNESS: That is correct. He was walking in that direction.

* * * * *

272 JOHN ALLEVA

called as a witness by the Government, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

* * * * *

273 BY MR. SCHROEDER:

Q. Did you have an occasion to respond to a call on Eaton Road, Southeast, I believe? A. Yes, sir.

Q. Would you tell us what occurred at that time? A. We received a call to go to Eaton Road and look for one Miller, a fellow by the name of Miller.

MR. McGRAIL: Your Honor, may my prior objection, that was raised on voir dire, apply to the testimony of this witness?

THE COURT: Yes.

* * * * *

276 CROSS EXAMINATION

BY MR. McGRAIL:

* * * * *

277 Q. You were cruising when you received instructions, right? A. Yes.

Q. What were the instructions you received? A. I didn't receive them. My partner did. We got a call, if I remember right, to call 206, our extension down in detective bureau, and my partner got out and talked to somebody down there and then they advised him to go on Eaton Road.

* * * * *

278 Q. And how many cruisers were there at the scene at this time? A. That would be hard to say. I guess about three or four. I honestly couldn't say that, there were so many men there.

Q. They were all armed? A. Most policemen are.

Q. And you surrounded this house? A. That is correct.

279 Q. Where you found the defendant Miller. And you didn't go in the front way? A. No. We couldn't get into the front way.

Q. You went around to the rear? A. There were officers in the front. I was already in the back. What we do, some take the front, some take the back.

Q. You and some other officers entered the back door? A. Yes, after she opened the door; that is correct.

Q. She opened the door pursuant to a knock? Did you knock on the door? A. They had knocked on the front door and they were advised that the door wasn't operating right, to come around the back. And this other officer, I don't recall which one it was, said that the front door is broke, she is going to open up the back door. That is how we got in the back door.

Q. When the back door was opened you and some other officers walked in? A. That is correct.

Q. She didn't invite you in? A. She opened up the door.

Q. When the door was opened, you all walked in? A. Yes, sir.

Q. When you walked in did you pull your gun? A. After I seen the front door barricaded I did.

280 Q. The question is, Officer: Did you pull your gun? A. Yes.

Q. The answer is yes, you pulled your gun? A. Yes, sir.

Q. And the other officers had their guns out? A. I imagine they did. Yes.

* * * * *

281 Q. Did you advise Miller of why you were arresting him? A. When he come down that attic, I went back up. I didn't take him out to the car. So I didn't advise him of it.

Q. The answer is no, you did not? A. No, I didn't advise Miller, no.

Q. Did you have a search warrant when you went into the house? A. No.

Q. Did you have a warrant for the arrest of Miller? A. No.

* * * * *

282 CHARLES P. LYNN

called as a witness by the Government, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. SCHROEDER:

Q. Sir, would you state your name and duty assignment, please.
A. Detective Charles P. Lynn, assigned to robbery squad, Metropolitan Police Department.

* * * * *

288 Q. At any time, while you were present with the defendant in the robbery squad, did you hear him make any statements to you or others present with respect to himself? A. Yes, sir, I did.

Q. What did he say with respect to himself? A. He was being interviewed with reference to --

THE COURT: Can't you answer that question?

A. He said that he was standing by a door at a recent hold-up in his getaway car.

Q. Did he say where the hold-up took place? A. At the Old Hickory House restaurant.

* * * * *

289 CROSS EXAMINATION

BY MR. JONES:

* * * * *

291 Q. You recall how long after you started questioning him he made that statement?

THE COURT: He hasn't said he questioned him.

BY MR. JONES:

Q. Do you recall how long after the questioning started that he made that statement? A. It was within forty-five minutes or an hour?

THE COURT: What did you say?

THE WITNESS: Within approximately forty-five minutes from the time we got him in the robbery squad. Forty-five minutes to an hour.

THE COURT: To an hour, did you say?

THE WITNESS: Yes, sir.

BY MR. JONES:

Q. So he was questioned about forty-five minutes before he made the statement, is that right? A. Approximately, yes, sir.

Q. And were you questioning him with regard to this Hickory Hut robbery? A. I wasn't questioning him.

Q. Excuse me. Were the questions with regard to that? A. Yes, sir.

* * * * *

296 Q. Now, you said this defendant was questioned for forty-five minutes before he made the statement, is that right? A. Approximately. Within forty-five minutes to an hour.

* * * * *

297 (At the Bench:)

MR. JONES: Your Honor, on the basis of this officer's testimony, I would like to again object to the admission of this defendant's confession on the grounds that it is a violation of the Mallory rule. The Mallory rule provides for certain delays before a defendant is brought before a commissioner. For example, delay incidental to booking. I believe the record always shows that the booking did not occur until early the following afternoon. This officer also testified that this questioning continued for forty-five minutes before the statement was made. I don't think that the purpose of this questioning can be any other than not to elicit a confession of this defendant, and the Mallory rule does not allow such questioning unless it is within a

298 delay, for example pursuant to booking, or threshold confession. I don't believe this falls in either category. I believe I will have to object on this ground, violation of Rule 5-A, of the Mallory case.

* * * * *

MR. JONES: Your Honor, my objection is based on this officer's testimony, his stating it was forty-five minutes. I don't believe I have a basis for objecting if this confession was made in a squad car.

299 I submit there is further doubt about this confession in the sense that Detective Fallin stated that this man appeared to be somewhat intoxicated and slow in his answers. I think there is a basis for this objection as to its admissibility.

THE COURT: You say you object. I guess you mean that you move to strike.

MR. JONES: Move to strike at this point, yes, sir.

THE COURT: Motion is denied.

(End of the Bench conference.)

* * * * *

300 RECROSS EXAMINATION

BY MR. JONES:

Q. Officer, was the statement made voluntarily? A. Yes, sir.

Q. The defendant didn't show any hesitancy about making the statement? A. Well, he was a little slow in responding. That is, he didn't respond -- I mean he just didn't come out and say everything at once. He just didn't comprehend for some reason.

Q. But he appeared to be cooperative, did he? A. Yes.

Q. Did you ask him to sign a written confession? A. No, sir, I didn't.

Q. Why didn't you do that? A. Well, like I say, I wasn't the main officer in this case. There is an agreement between my partner and I, any case, one of us are going to carry it on through, and therefore that person will conduct the investigation.

Q. But -- Finish your answer. A. But I was present.

* * * * *

302 (Thereupon, at 11:26 a.m., a recess was taken)

AFTER RECESS

MR. SCHROEDER: At this time, Your Honor, the Government chooses to rest its case.

THE COURT: Come to the bench, please.

(At the Bench:)

THE COURT: I notice that the partner of Private Fallin has never been called, or his absence accounted for.

MR. SCHROEDER: I attempted to do that last Thursday, Your Honor. He was here and he was scheduled to go on vacation in Florida. And at that time I felt that his presence wouldn't be further needed and

303 I did release him.

THE COURT: I will have to give the missing witness instruction. You know what I am talking about.

MR. SCHROEDER: Sergeant Gray.

THE COURT: I had forgotten what his name is. It seems to me you should have made that fact known to me, unless you expected me to give the missing witness instruction.

MR. SCHROEDER: I will just have to agree with His Honor. Nothing has been going right.

THE COURT: I can see that.

I suppose there will be some general motions and some specific motions?

MR. McGRAIL: Yes, Your Honor. May I make a motion with respect to defendant Miller at this time?

THE COURT: Suppose we have the jury retire.

The jury will retire to the jury room while counsel take up some matters of law.

(End of the bench conference.)

(The jury retired to the jury room.)

MR. McGRAIL: Shall I proceed first, Your Honor?

THE COURT: I don't care. I think you have a very specific problem that ought to be disposed of in two or three minutes.

MR. McGRAIL: Yes, Your Honor.

304 In respect to the first count against defendant Miller, there has been no proof tying defendant Miller into the Sher Lee robbery, which is set forth in the first count.

THE COURT: You wish to oppose that motion?

MR. SCHROEDER: The Government will dismiss count one.

THE COURT: No, you can't dismiss it after the jury has been sworn. I can direct a judgment of acquittal.

MR. SCHROEDER: The Government is in agreement with counsel that the defendant Miller has not been implicated in the Sher Lee robbery, which I believe is count one of the indictment.

THE COURT: All you have against the other defendant Gatlin is the identification by Mr. Payne. There is no confession.

MR. SCHROEDER: No, sir.

THE COURT: Now as to your second count.

MR. McGRAIL: I would like to move there also for a judgment of acquittal. Of course I would re-urge my earlier contention that the arrest was illegal. I also want to point out that the only evidence against defendant Miller in respect to the second count, the Hickory House, is identification by a witness, Mary Manning, who by her own testimony saw very little of the incident. She did not even know there was a robbery taking place until it was well underway, when she

305 suddenly heard someone nearby say "Get on the floor." She could not identify anyone else there and the only way she could identify him is by his color and his high cheek bones, which I do not think is an adequate identification.

But I would also like to point out that although there were two other waitresses in the shop at the time, and a number of customers, none of them were able, or were called, or were able if they were called, to identify defendant Miller. I think that is inadequate proof. It involves definitely a reasonable doubt.

The only other item is an alleged statement whereby defendant Miller admitted participation, but the police officers stated that he was brought to robbery squad headquarters where he broke down and started to cry and then was asked. And he said, according to police officers, said yes, he did, he alone robbed the place and went over to the cash register and took the money. The facts by the witnesses are

that there were three people there, that defendant Miller did not go to the cash register but went down to the coffee stand where Mary Manning was standing. So the so-called admission by defendant Miller is not accurate, and in view of the emotional state he was in -- he was in a home which was surrounded by police, he was suddently arrested, at gunpoint taken to police headquarters, broke down and admitted an
306 alleged crime, but his admission itself is inaccurate.

I think there is definitely a reasonable doubt here and I don't think it should be submitted to the jury, so I also move for a not guilty in respect to the second count.

THE COURT: I will deny your motion as to the second count.

MR. JONES: Your Honor, on behalf of the defendant Gatlin, I would first like to make a motion for judgment of acquittal on count one, which involved the robbery of Lee's Delicatessen. The ground for this motion is that only one witness, Mr. Payne, was able to identify this defendant, and even he had made a previous inconsistent statement to the police. I believe that evidence showed in that he stated that the man that placed the gun against his body, who was allegedly this defendant Gatlin, he stated this man was 5 foot 4 inches tall. And I believe that the jury and Your Honor are aware that this defendant stood up and is well over that height.

There were other customers in that store, none of whom were brought here to court to identify this defendant, and the proprietor himself, Mr. Lee, who is presumably as reliable a witness as anyone, was unable to identify this defendant. I believe that there is only a scintilla of evidence implicating this defendant in that particular
307 robbery. There is no confession, and insufficient corroboration. I don't believe that a jury of reasonable men could reach a verdict of guilty on such evidence, and I ask that the motion be granted as to count one.

MR. SCHROEDER: The Government opposes that motion on the basis that Mr. Payne while in court did make a positive identification of the defendant Gatlin and stated that he was the one that held the gun in his side in the Sher Lee grocery store.

The rest of counsel's allegations are questions of fact of credibility to be decided by the jury.

THE COURT: Motion is denied on the first count.

* * * * *

310 MR. JONES: Your Honor, I would like the record to show that I subpoenaed two witnesses who are not here today. That is Frances Taylor and Tomasine Brown.

THE COURT: You want an attachment for them?

MR. JONES: The marshal went to the residence of Tomasine Brown and apparently it said that she wasn't living there any more.

I personally went to where this Frances Taylor had been living and she had left with no address.

I don't know if an attachment would be successful, without knowing their whereabouts. I have been unable to find their whereabouts. I have done what I could.

THE COURT: All right. Have the jury come in.

(The jury then returned to the courtroom.)

THE COURT: Members of the jury, on count one, which charges Gatlin and Miller with robbery of Sher W. Lee, I have granted a judgment of acquittal in favor of Miller inasmuch as there is no evidence of any kind whatsoever connecting Miller with that particular robbery.

* * * * *

311 PAUL W. GATLIN

called as a witness in his own behalf, being first duly sworn, was examined, and testified as follows:

DIRECT EXAMINATION

BY MR. JONES:

Q. Will you state your name, please. A. Paul Warren Gatlin.

Q. Where do you live? A. 1238 Eaton Road, Southeast.

Q. How long have you lived there? A. About 21 years.

Q. Are you employed? A. Yes, I am.

Q. What is your occupation? A. I am a painter by trade, but
312 I am a truck driver too.

Q. Now, going back to November 8, of last year, do you remember that day? A. Yes, sir.

Q. You remember where you were about seven o'clock in the evening of that day? A. Yes, sir.

Q. What were you doing? A. Me and some more fellows and a couple of girls, we were at a girl's house that I know, and we was gambling.

Q. What kind of gambling were you doing? A. Shooting dice.

Q. How long did you stay at that house? A. An hour and a half, two hours.

Q. So what time did you leave about? A. It was around nine o'clock.

Q. Now, where did you go after you left? A. I went home. Went up to my mother's house, 1238 Eaton Road. And the house that we was in was also on Eaton Road too.

Q. Do you recall the names of these people that you were gambling with? A. Well, I know the girl, her name was Beatrice, and her brother was down there originally, and Dennis Miller, and two
313 fellows, I think they were in the Air Force based at Bolling Field, and another friend of Beatrice.

Q. You reached home about 8:30, is that what you said? A. About 8:30 or 9:00 o'clock.

THE COURT: About 8:30?

THE WITNESS: Or nine. Between 8:30 and 9:00.

BY MR. JONES:

Q. How long did you stay at home? A. I stayed home until it was a little after ten, because Alfred Hitchcock was coming on as I went out and it comes on at ten o'clock, I think.

Q. Where did you go when you left? A. Went down Nichols Avenue to a restaurant.

Q. What is the name of that restaurant? A. Cooper's restaurant.

Q. Did you go in there with anyone else? A. Yes, sir. It was me and my brother and Dennis Miller.

Q. How long did you stay in that restaurant? A. Until around one o'clock.

Q. Now, where did you go when you left? A. We left the restaurant. We was in there drinking beer and when we left we went to Dennis Miller's house and we was in Dennis Miller's house and drinking. We were drinking whiskey and listening to some records.

314 Playing records.

Q. What time did you get to that house? A. Well, he doesn't live but about four and a half blocks from Cooper's, so it didn't take but about five or ten minutes.

Q. Do you know a girl by the name of Frances Taylor?

A. Yes, sir.

Q. Did you have a conversation with her that evening?

A. Yes, sir.

Q. What time was that? A. I talked with her twice. I talked with her when I first went home around nine o'clock. And I talked with her later on in the night after I left Dennis Miller's house.

Q. What time was the second time that you talked with her?

A. It was around two o'clock.

Q. And where were you when you talked to her? Was this personal conversation, or what? A. I was downstairs in the front room. My brother and I were down there. My mother and father were upstairs.

Q. And after that conversation, where did you go? A. My brother and I left out the house. My brother was going down to Mile-Long and get a couple of sandwiches and I was going to catch a cab and go over to Frances Taylor's house.

315 Q. Where does she live? A. Fourteen hundred block of Talbert Street, Southwest.

Q. What time did you get over to her house? A. I got over to her house a little after two. I don't know exactly what time. It was around two-thirty, I guess.

Q. Did you see her over there? A. No, sir, I didn't.

Q. Did you wait there? A. Yes, sir. She doesn't have a telephone. When she called me she was up in Northwest, at a girl's house and some kids that she take care of, and she told me she wanted me to talk to her. And by me catching a cab, I was a lot closer to where she lived than where she was working at, so I got over there before she did and I waited there for her.

Q. How long did you wait there for her? A. About fifteen or twenty minutes.

Q. Did you go inside? A. No, sir.

Q. Why didn't you go inside? A. Because it was just a one-bedroom apartment and she stayed there with her grandmother and her two children and it was real late in the morning. I knocked on the door but she didn't answer. I figured that I would get there before she

316 would anyway.

Q. Now, so you left after about twenty minutes, is that right? A. Yes, sir.

Q. Which direction did you go when you left? A. I came -- Talbert Street is a half a block off South Capitol Street right at the foot of the bridge. I came back on South Capitol Street and started walking across the bridge because don't no cabs come down South Capitol Street, because on the other side of the bridge just Bolling Field and the highway, and it's hard to catch a cab there, so I proceeded walking across the bridge.

Q. Did you pick anything up after you left her house? A. Yes, sir, I picked a toy gun up in front of her house while I was sitting on the porch.

Q. Do you recall what that gun looked like? A. Yes, sir. It's the gun they have in here.

Q. Where did you pick it up? A. It was in her yard.

Q. Showing you Government's Exhibit 1, is this the same gun which you picked up in that yard? A. Yes, sir.

Q. Why did you pick it up? A. Because it was laying out there. In front of her house it's a lamp-post and it lights the front of her

317 house up and I was sitting on the porch waiting for her and saw the gun. They had paper stuck down in the barrel and I was pulling the paper out of the barrel.

Q. What were you going to do with it? A. I was going to take it home and give it to my son.

Q. Now, you said you lived at 1238 Eaton Road, is that right? A. Yes, sir.

Q. How long have you lived there? A. About 21 years.

Q. Are you familiar with that area? A. Yes, sir.

Q. Could you indicate where Eaton Road is in relation to this map which this Officer Fallin has drawn? Would you come down here and point out where that road is?

(The witness stepped to the board.)

THE COURT: Hand him the pointer.

THE WITNESS: Say this is the parkway here.

THE COURT: A little louder.

THE WITNESS: Say this was the Suitland Parkway here. Eaton Road sits about right over here. It's about two and a half blocks.

318 BY MR. JONES:

Q. Could you sketch in that area? A. Yes, sir.

This is the car line avenue. It's a red light here. Right over here is a project section.

THE COURT: Is a what section?

THE WITNESS: Project. And the first row of houses, it sits about 20 yards off of the highway, before the first row of houses starts here. This is Sumner Road over here. Houses on both sides of Sumner Road. The next street over is Eaton Road. I live about right here.

MR. JONES: Would you make a mark there.

THE COURT: Cross mark.

BY MR. JONES:

Q. Now, you said that you left Frances Taylor's house and started walking. Where were you going? A. I was coming back home.

Q. Could you indicate to us, to His Honor and the jury, the direction that you took by pointing out on that map. A. I came across the South Capitol Street -- it sits over in here somewhere. I came through here this way towards the gas station. I went in the gas station and stopped. They didn't nobody say about that. I purchased a can of motor oil in the gas station that the police Detective Fallin took off of
319 me. He didn't say anything about that. I came out of the gas station, across the highway to this side. Started walking up. When I seen a police car come out of the driveway of the gas station and stop here, I turned around because it was late at night and when the car pulled in it was fast and squeaked the tires, drew my attention back to the car. I was, you know, right along in here then. So one of the policemen jumps out of the car and went back in toward the gas station, stayed a few minutes, and then he came back and came across the dual highway and was coming right up behind me as I was walking, and I noticed that because the lights of the scout car were real bright and it was shining on my back. When I turned around the police car was right up on me and I stopped. One of the policemen got out and shook me down.

Q. By using this crayon, would you sketch in the route that you took, walking back from this girl's house? A. The gas station take this whole thing up here.

THE COURT: Start with Frances Taylor's house. Was it Frances Taylor's?

THE WITNESS: Yes.

THE COURT: Start with her house. You can't very well. That is on the other side of the bridge?

320 THE WITNESS: Yes, sir. Frances Taylor live back over here at the foot of the bridge. I came from her house up on the bridge and walked across the bridge over into the gas station. I bought a can of motor oil here from the gas station. I didn't see any policemen in there. Then I came out of the gas station and walked across this side because I live on this side of the parkway. I crossed the parkway here and was walking up here towards my house when they picked me up.

BY MR. JONES:

Q. Was it unusual for you to take that route? A. No, sir. I walked over there many nights because I was working during the, you know, during the morning from eight to six. And she worked from six to twleve taking care of the children. A lot of nights she would come over to my mother's house or I would go over to her mother's house when she gets off from work.

THE COURT: You want him to stand by the board any longer or do you want him to resume the stand?

MR. JONES: I think you can resume the stand.

THE COURT: Very well.

(The witness resumed the witness stand.)

BY MR. JONES:

Q. How many times a week did you go over to her house?

321 A. I go over there approximately two or three nights a week.

Q. And what was your usual practice in returning from her house to your home? How did you get home? A. I would come home the same way. I would walk every time I go over there. My mother has offered cab fare a lot of times but I could walk over there quicker than transportation could carry me over there.

Q. Did you always walk back this same route you just showed us? A. Yes, sir.

Q. Now, were you walking along the edge of that parkway? A. Yes, sir.

Q. How far from the edge were you? A. About three inches.

THE COURT: About "parkway," don't you think it might be a little better if you would be more precise? Not as to the name of it, but "parkway" may mean paved parkway, grass parkway, gravel parkway, et cetera.

BY MR. JONES:

Q. How far were you walking from the paved portion of Suitland Parkway? A. About three inches. Three foot.

THE COURT: Three?

322 THE WITNESS: About three feet from the parkway.

BY MR. JONES:

Q. Now, on that particular early morning, were you ever walking in this area, this lightly wooded area here, off back about 50 yards west of Suitland Parkway? A. No, sir. It's a fence up there, because of construction work, they are building a new bridge, two bridges overpasses there, and they have about a 25-foot fence, a wire fence over there.

Q. So were you walking over there or not? A. No, sir.

Q. Did you have some money with you at the time you were arrested? A. Yes, sir.

Q. Where did you get that money? A. I had won at gambling. It was some of the money that I had won at gambling. I had more than that.

Q. What denomination was that money in? A. It was in my pocket.

Q. No. What denomination? A. It was quite a bit of change and a lot of one-dollar bills.

Q. You remember how much money it was? A. About $47.00.

323 Q. Which pocket did you have it in, do you recall? A. I had it in separate pockets. I had my change in my front left pants pocket and my bills in the right pants pockets.

Q. And then I think you said that some police pulled up behind you, is that right? A. Yes, sir.

Q. What happened then? A. When I turned around one of the policemen got out of the car and asked me to come over towards the car and keep my hands away from my clothes. So I walked over towards the car and he told me to put my hands up on top of the car and lean on the car. So I did that and they searched me and took the gun and the money, can of oil, and a bank book that I had found, off of my possessions.

Q. And what happened then? Did they take you anywhere? A. They waited a few minutes. Then they took me down to the No. 1 Precinct. On the way down there Detective Fallin was questioning me about Hickory robbery. When I told them that I didn't know anything about it he seemed to think that I was telling them a story, so I asked him if he would take me over to the Hickory Hut to see if the girl could identify me and if she would I would sign a written confession to it if she could identify me. He said he was going to take me down to the
324 precinct first and ask me some questions down there.

Q. Do you remember what time you got back to the precinct? A. It was between 3:00 and 3:30.

Q. And where were you taken in the precinct? A. I was taken straight to the robbery squad in the back room.

Q. Now, you heard these officers testify that you made a statement to the police saying that you were involved in this robbery. Did you make that statement? A. No, sir.

Q. Are you certain of that? A. Yes, sir.

Q. What did you tell the police? A. I told -- When I first got there, a policeman -- they started using violence, started hitting on me, questioning me about the robbery. So after they started, I didn't know, wasn't going to tell them and they asked me about the money that I had on my possession. I told them that I won the money. He asked me where was I gambling at. I told them. They asked me who was I playing with and I told them that too. He in turn went up and picked up Dennis Miller and had him at No. 11 Precinct to pick up my brother and brought them down too. They took me in the scout car with them when they went to get Dennis Miller.

325 Q. Had you had anything at all to drink that night? A. Yes, sir.

Q. Do you recall how much? A. I had been drinking quite a bit because we started drinking the early part of the day and I don't usually drink so it didn't take much, you know, to make me high.

Q. Now, did you go to work that day? A. No, sir.

Q. What was the last day that you did work? A. The last day that I worked was that Tuesday.

Q. That was how many days before? A. Two days.

Q. Now, you were in court when this man, Mr. Payne, took the stand, weren't you? A. Yes, sir.

Q. And you heard him say that you had stuck a gun into his side, didn't you? A. Yes, sir.

Q. Is that true? Did you do that? A. He stated that I stuck a gun into his left side. In order for me to do that I would have to be left-handed. I am right-handed.

Q. Were you in that delicatessen that night? A. No, sir.

326 Q. Did you take any money from that delicatessen that night? A. No, sir.

Q. Were you in the Hickory Hut that evening? A. No, sir. I have been in the Hickory Hut many times, but I wasn't in there this particular night.

Q. Did you take anything from the Hickory Hut that night? A. No, sir. I wasn't over there.

Q. Now, you know that the grand jury has charged you with two crimes. The first one with taking some money from Lee's Delicatessen. Are you guilty of that or not guilty? A. I am not guilty.

Q. And the second one is with regard to the Hickory Hut. Are you guilty of that one or not guilty? A. I am not guilty.

MR. JONES: Nothing more at this time.

* * * * *

CROSS EXAMINATION

BY MR. SCHROEDER:

* * * * *

362 Q. As you were walking across the bridge from Miss Taylor's house, where did you have the gun? A. In my overcoat pocket.

Q. Why did you put it there? A. Because it was the closest pocket to me.

Q. What were you going to do with it? A. Give to my son.

Q. How old is your son? A. Eight years old.

363 Q. You couldn't afford to buy him a new gun? A. Probably could have.

Q. Isn't it a fact that you had this gun earlier in the evening and you used it to commit the hold-ups at Sher Lee's grocery store and Hickory House? A. I didn't rob any grocery store or Hickory House.

* * * * *

368 Q. Are you the same Paul Warren Gatlin who on February 8, 1957, was found guilty of simple assault? A. Yes, sir.

Q. Are you the same Paul Warren Gatlin who on August 2, 1960, was found guilty of petty larceny? A. Yes, sir.

Q. And are you the same Paul Warren Gatlin who on December 15, 1959, was found guilty of larceny? A. Yes, sir.

* * * * *

369 BY MR. McGRAIL:

Q. During the evening when you saw and were with defendant Miller, do you recall what type of overcoat and hat, if any, he had? A. If I am not mistaken, he had on a brown overcoat and a brown hat.

Q. Brown hat and brown overcoat? A. Yes, sir.

* * * * *

379 DAVID GATLIN

called as a witness by defendant Gatlin, being first duly sworn, was examined, and testified as follows:

DIRECT EXAMINATION

BY MR. JONES:

Q. Would you state your name, please, sir. A. David Gatlin.

Q. What is your residence? A. 1238 Eaton Road, Southeast.

Q. What is your occupation? A. Laborer.

Q. Are you acquainted with the defendant Paul Gatlin? A. My son.

Q. Now, I want to direct your attention to about ten o'clock on the evening of November 8, 1962. Do you recall what you were doing at that time? A. Yes. I was in my bedroom. I usually goes up early,

380 gets my radio and reads the paper or book, while the rest of the family watches television, and I don't care too much about watching television. That night, around ten o'clock, my wife came up in the bedroom and told me --

MR. SCHROEDER: Objection.

THE COURT: You object?

MR. SCHROEDER: Yes, Your Honor.

THE COURT: I sustain the objection.

You can't state what your wife told you. She came up to your bedroom and told you something?

THE WITNESS: Yes, sir.

BY MR. JONES:

Q. You can't answer that. A. Well, I was in my bedroom, like I said, and I did because, some more boys and my wife and kids were all downstairs. As far as coming down and seeing them, I didn't see them because I was upstairs and they were downstairs. I know they were down there because I heard them. But to come down for me seeing them, I didn't see them.

Q. Could you hear the voice of your son? A. Oh, yes. I know the voice.

Q. Did you hear it that night when you were up in your bedroom?

381 A. Yes, sir.

MR. JONES: Nothing further.

* * * * *

383 WAYLAND H. FALLIN

recalled as a witness by defendant Miller, was examined, and further testified as follows:

DIRECT EXAMINATION

* * * * *

384 BY MR. McGRAIL:

Q. Sergeant, what I would like to find out is the clothing worn
385 by defendant Miller, now at any time after you arrested him, that you can tell from your records, or as close to the arrest as possible. I do not know what your records show. A. I can only show by this photograph, was taken at a lineup, shortly after the arrest.

Q. Then what is this other document, Sergeant? A. This document is a report made of the incident, of the offense, was made by the officers who responded to the scene of the crime, at the time, or shortly thereafter.

Q. All right. And is there any document prepared by any police officer, that is in your records, reflecting what defendant Miller was wearing in respect to his hat and overcoat when he was arrested? A. No; not that I know of.

Q. You have a photograph. Would you refer to that? A. Yes.

Q. Can you tell, or does that help refresh your recollection, as to the color of the overcoat and the hat that the defendant Miller was wearing? A. Yes, it does. It was a dark brown overcoat, with a slight check in it. Checkered design in the overcoat. And a brown hat.

Q. Thank you. And would you also examine the photograph and
386 tell whether defendant Miller had a beard on his chin as of the time of his arrest? A. From the photograph, there is an indication that he had a slight growth on his chin. Chin whiskers or maybe goatee. Very slight. Like a shadow more or less. I don't recall from memory.

MR. McGRAIL: That is all I have of the witness, Your Honor.

CROSS EXAMINATION

BY MR. SCHROEDER:

Q. Do you recall what time that photograph was taken, Sergeant? A. I have a record of the time it was taken.

Q. Would you please check your records. A. Nine-fifty A.M. on 11-9-62.

Q. It was taken in police headquarters? A. Yes, sir. Office of the robbery squad.

MR. SCHROEDER: Thank you.

REDIRECT EXAMINATION

BY MR. McGRAIL:

Q. 11-9 means November 9, does it not? A. Yes, it does.

* * * * *

387 DENNIS O. MILLER

called as a witness in his own behalf, being first duly sworn, was examined, and testified as follows:

DIRECT EXAMINATION

BY MR. McGRAIL:

Q. Will you state your full name and your address, please. A. Dennis O. Miller, 2641 Bierney Place, Southeast.

THE COURT: What is that place?

THE WITNESS: Bierney.

THE COURT: Bierney?

BY MR. McGRAIL:

Q. B-i-r-n-e-y? A. Yes.

Q. And you have heard the testimony in this case regarding the night of November 8 on into the morning of November 9 last year, have you not? A. Yes, sir.

Q. I want to go back to that evening, and let's start around supper time, and would you state what you did that evening. A. Well,

388 about 5:00 or 5:30, went down to this house where they sell whiskey at. And a couple of guys in there from the Air Force looking

for a dice game. So I asked them if they wanted to get one started, that I would round up some fellows and get one going. So I went to my girl friend's house, at 1140 Eaton Road, Southeast, and after they, drinking --

Q. About what time did you get there? A. About 6:00, 6:30.

Q. All right. A. And then Gatlin and his brother came there. And started shooting dice, upstairs in the bedroom on the bed, until about 9:00, 9:30, I don't know what time.

Q. All right. Where did you go then? A. Gatlin and his brother left, and two guys in the service and I stayed there to clean up the liquor bottles and the beer cans. And then I went out to Gatlin and his brother, to try to get him back in the game, because he had won some money, you know, and the guy from the Air Force, I didn't know what he had won. So got to his house, they had gone to the restaurant, Coopers. That is where I found them at, down there.

Q. That was Coopers restaurant? A. Yes.

389 Q. And you went there? A. Yes, sir.

Q. About what time was that when you went to Coopers restaurant? A. Maybe something till ten or after ten. I don't know.

Q. But before you went to Coopers restaurant did you say you stopped at Gatlin's house? A. Yes.

Q. And how long did you stay at Coopers restaurant? A. Twleve-thirty, or something till one, one o'clock.

Q. And then where did you go? A. Up to my house.

Q. That is at Birney Road? A. Birney Place.

Q. And how long did you stay there and where did you go next? A. Maybe an hour, maybe not an hour, maybe more than that. I wouldn't say. And we was drinking there too. And him, Gatlin, his brother, and the two girls and there was another girl, they left out, went towards Nichols Avenue, and I came out and went to the back of the house, down the hill to Eaton Road. Went back to my girl friend's house. Sit in the chair, fell asleep.

Q. Is that Beatrice's house? A. Yes.

390 Q. 1114 Eaton Road? A. Yes, sir.

Q. And was she there when you got there? A. No.

Q. And you say you went in the house and went to sleep?

A. Yes.

Q. And about what time did you get there? A. Two-ten. Quarter after. I don't know. Two o'clock.

Q. What were you wearing that evening? A. Dark brown hat, brown overcoat, brown pants. Brown sweater, brown shoes, brown socks. Blue shirt.

* * * * *

391 Q. You describe how you got back to Beatrice's house that night and went to sleep. And what was the next thing that happened? A. Somebody was banging at the door.

Q. And what happened then? A. Well, she was on public assistance. And I wasn't supposed to be there. So --

Q. You mean Beatrice was on public assistance? A. Yes. And I jumped up and went up to the attic. That is where I usually hide at when they come there to investigate us.

Q. Do they usually come at that time of night? A. Any time. Nine at night. Any time. Saturday, Sunday.

Q. You thought they were some people from public assistance checking up to see if you were there? A. Right.

Q. And you went up in the attic? A. Right.

392 Q. What happened next? A. I heard a lot of commotion downstairs. And I was standing on the door, the trap door, like the officers said, when he pushed it up. And he hollered come on down.

Q. Did you come down? A. Yes.

Q. And then what happened? A. I threw my hat, coat down first, and they handcuffed me, put me in the car.

Q. Where did they take you? A. Up on Stevenson Road. The next street over, Stevenson Road.

Q. Then what happened? A. They asked me where is Jones Ford. I said I didn't know, I knew where his mother lived at. So I took them to his mother's house. And the police told Mrs. Ford up there, told Mrs. Ford that they was looking for her son. And she asked me what did they want him for. I told her I didn't know what for. So took me to police headquarters.

Q. What happened there? A. They asked me about -- No, first they asked me was I with Gatlin. So I said yes. So they said, well, Gatlin said you and him robbed the Hickory House restaurant. Well, I
393 denied it at first. And there were so many of them asking questions, this one asked one, this one. So I got excited and started crying, and I started -- admitted to everything. Everything they asked me I said yes, I did it, I did it. They said: Who was with you? I said by myself. So I settled down, I told them that I didn't do it, I didn't mean to say what I said.

Q. You told them that you didn't mean to say what you said? A. Yes.

Q. And thereafter did you ever again admit that you had committed any of these things which the police officers had claimed? A. No.

Q. Were you on one occasion, on one occasion, convicted of a felony, Mr. Miller? A. Yes, I was.

Q. Now, you know where the Hickory House is? A. Yes, sir.

Q. Have you been in there on any occasions in the past, other than the night of November 8? A. I can't say.

Q. Well, now on November 8, were you on that evening, and especially at approximately 2:15 a.m., which would make it on the 9th,
394 were you in the Hickory House restaurant? A. No.

Q. Were you part of a group which stuck up the Hickory House restaurant? A. No.

Q. You deny that? A. I deny it.

* * * * *

[CROSS EXAMINATION]

402 BY MR. SCHROEDER:

Q. Then you went to your girl friend's house. Is that Beatrice?

A. Yes.

Q. What is her last name? A. Snow.

Q. Where does she live? A. 1114 Eaton Road.

Q. Is that right near you? A. Right near me.

Q. Where did you live? A. 2641 Birney Place.

403 Q. Is that near Mr. Gatlin's house? A. Down the street.

Q. Who was at Beatrice's house when you got there?

A. No one.

Q. Nobody at all? A. No. Not then.

Q. Did you go in the house? A. Yes.

Q. How did you get in the house? A. Had keys.

Q. You have got keys? A. Yes.

Q. You don't live there, do you? A. Well, I have been staying there off and on for two years.

Q. You let yourself into Beatrice's house? A. Yes.

* * * * *

405 Q. How much money did you have when you started playing dice? A. About two hundred.

Q. You had two hundred dollars? A. Yes.

Q. Where did you get that much money from? A. Previous gambling.

Q. Previous gambling? A. Yes, sir.

Q. You gamble a lot? A. Well, a --

Q. How much did you lose? A. Just about all of it. Except thirty-two dollars.

Q. Thirty-two dollars? A. Except thirty-two dollars.

406 Q. You lost about $168? A. Somewhere in there. I don't know.

Q. Who was the big winner? A. Well, Gatlin won some. One of the Air Force guys.

* * * * *

413 Q. What did you do when you got to Beatrice's house?

A. I had been drinking. I sat down on the couch. My coat and hat on. And fell asleep.

Q. Beatrice wasn't there? A. No.

Q. Nobody was there? A. My sister was there but she say she didn't hear me when I came in.

Q. Your sister was there? A. Yes.

Q. Does she live with Beatrice too? A. Sometimes.

Q. Did you see your sister there that night? A. No.

Q. You fell asleep in the living room? A. Yes.

Q. In a chair? A. On the studio couch.

Q. What time was this? A. It was a little after two.

414 Q. And then the police came knocking onthe door? A. Well, it was daylight when they came.

Q. It was daylight? A. Yes.

Q. They came knocking on the door? A. Yes.

Q. Which door, do you remember? A. Both of them.

Q. And you ran upstairs thinking it was the Welfare people?

A. Yes.

Q. This was about six-thirty, seven o'clock in the morning?

A. Yes.

Q. Had the Welfare people ever come to that house before?

A. Yes.

Q. When? A. That time in the morning, two o'clock in the morning, three o'clock in the morning, nine o'clock at night, four o'clock in the evening. Any time.

Q. They were there a number of times? A. Yes.

415 Q. Were you there when they were there? A. Sometimes.

Q. Did they cut off Beatrice's welfare when you were there?

A. No. I would go up in the attic.

* * * * *

420 Q. Are you the same Dennis O. Miller who in May 1957 was convicted for housebreaking and larceny? A. Yes, sir.

421 Q. And are you the same Dennis Miller who in August of 1962 was convicted of taking property without right?

MR. McGRAIL: Objection. May we approach the bench, Your Honor?

THE COURT: Yes.

(At the Bench:)

MR. McGRAIL: Before we proceed further in this and because of the fact it may be prejudicial, I would like to inquire. I have no knowledge that this defendant was convicted of any other crime which is admissible for the purpose of attacking his credibility at this time.

MR. SCHROEDER: I have the defendant's record here and he was charged with housebreaking and robbery, and it was reduced to taking property without right.

MR. McGRAIL: The fact he was charged with housebreaking of course is not relevant. And I question the admissibility of the fact that he pleaded guilty to a misdemeanor.

MR. SCHROEDER: A misdemeanor involving moral turpitude, though.

THE COURT: Are you objecting to that question?

MR. McGRAIL: Yes, Your Honor.

THE COURT: Overruled.

* * * * *

423 REDIRECT EXAMINATION

BY MR. McGRAIL:

Q. You know where Beatrice is now? A. No.

Q. You know whether she is at the same address she was that night? A. She has moved.

Q. But you don't know where she is located? A. No.

* * * * *

426 Washington, D.C.
Tuesday
February 12, 1963

* * * * *

430 (IN OPEN COURT:)

MR. JONES: May it please the Court: I would like to offer in evidence at this time three exhibits. The first is Defense Exhibit No. 1, which is a United States Marshal's return of service on a subpoena issued for --

THE COURT: Don't state what it is. Offer it. If there is no objection it will be received; then you can read it to the jury.

MR. SCHROEDER: No objection.

THE COURT: All right. The next one is No. 2.

MR. SCHROEDER: No objection.

THE COURT: The next is No. 3.

MR. SCHROEDER: No objection.

THE COURT: They will be received.

(Thereupon, returns were marked Defendant's Exhibits 1, 2 and 3, respectively, and were received in evidence.)

THE COURT: Read them to the jury.

MR. JONES: Exhibit No. 1 is a United States Marshal's return of service for a subpoena issued to a Francis Taylor of 1219 Tenth Street, and the return states: Unknown at this address and not found.

Defense Exhibit No. 2 is a United States Marshal's return of service issued for a Tomacine Brown, 8 E Street, Southeast. This is

431 marked, Unknown here.

Defense Exhibit No. 3 is a United States Marshal's return of service on subpoena as issued to two persons, Mary O. Manny and Judy Roberson. The notation next to the name Judy Roberson is: Not to be found.

I offer these in evidence at this time in the absence of objection.

THE COURT: They will be received.

* * * * *

LILLIAN GATLIN

called as a witness on behalf of Defendant Gatlin, was duly sworn, was examined, and testified as follows:

* * * * *

432 DIRECT EXAMINATION

BY MR. JONES:

Q. Would you state your name, please? A. My name is Lillian Gatlin.

Q. Where do you live? A. 1238 Eaton Road, Southeast.

Q. What is your occupation? A. I am a housewife.

Q. Now do you know this defendant? A. Yes.

Q. Who is he? A. That's Paul Gatlin, my son.

Q. Now I want to direct your attention to November 8 of last year, November 8, 1962. I want to ask you whether you saw your son Paul that evening. A. Yes, I did.

Q. What time? A. Well, you mean in the evening?

Q. Yes, I want to know if you saw him after six. A. Oh. Well, he came in around, I imagine it was quarter of ten or something, you know, almost ten.

Q. And how long did he stay? A. Well, altogether I would say around forty-five minutes.

* * * * *

435 DOROTHY GATLIN

called as a witness on behalf of Defendant Gatlin, was duly sworn, was examined, and testified as follows:

DIRECT EXAMINATION

BY MR. JONES:

Q. Would you state your name, please? A. Dorothy Gatlin.

Q. How old are you? A. Seventeen.

Q. Where do you live? A. 1238 Eaton Road, Southeast.

Q. Do you go to school? A. Yes, I do.

Q. What grade are you in? A. Eleventh.

Q. Now do you know this man here? A. Yes.

Q. Who is he? A. It's my brother.

Q. Now I want to go back to November 8 of last year. Did you see your brother at any time after 6:00 p.m. in the evening? A. Yes,

436 I did.

Q. What time? A. It was about, at least about quarter to ten.

Q. And where did you see him? A. He was in the house.

Q. And did you see him leave? A. Yes.

Q. What time did he leave? A. About twenty minutes after, between quarter after and twenty minutes after.

* * * * *

440 REGINALD K. GATLIN

was called as a witness on behalf of Defendant Gatlin, was duly sworn, was examined, and testified as follows:

DIRECT EXAMINATION

BY MR. JONES:

Q. Would you state your name, please? A. Reginald K. Gatlin.

Q. And what is your address? A. 1238 Eaton Road, Southeast.

Q. How do you know this man here, sitting here in the dark suit? A. Yes, sir.

Q. Who is he? A. He's my brother.

Q. What is his name? A. Paul W. Gatlin.

Q. Now I want to direct your attention to the early morning

441 hours of November ninth, 1962. I want to focus it about two a.m. Where were you at that time, if you can recall? A. I was home.

Q. And was anyone else with you at that time? A. My brother.

Q. Is that your brother Paul? A. Yes.

Q. Now what happened? A. Well, about 2:00 o'clock or 2:05 he received a phone call and I was trying to fix something to eat, and I heard some of the conversation and mostly he said he would be right over, and he left out.

Q. Did you know who that telephone call was from? A. Not specifically, no.

Q. Now do you know a girl by the name of Francis Staley?

A. Yes.

Q. Do you know where she lived on November 9, 1962?

A. Lived on Carlberger Street, Southwest.

Q. Do you know if your brother was acquainted with her?

A. At the present time he was going with her.

Q. Did he ever go to see her? A. Very, very -- he'd go see her just about every day.

442 Q. What time would he go when he went? A. Sometime it would be late, twleve, one o'clock; sometime it would be in the daytime.

Q. Do you know how he got to her house? A. Well, it was quicker to walk to her house than it is to drive the bus. Most of the time he would walk.

Q. Now, to the best of your recollection, what time was this phone call? A. About 2:05.

* * * * *

449 COURT'S INSTRUCTIONS TO THE JURY

THE COURT: (Pine, J.)

Members of the jury: When a case is tried to a jury the court consists of two parts, the Judge and the jury. The Judge has certain functions and responsibilities and duties, and the jury has certain functions and responsibilities and duties.

It is the Judge's function to preside at the trial, pass on

450 questions of law as they arise, and finally at this stage, charge the jury, which means to give the jury the principles of law applicable to the case.

You are required to follow the law as the Judge gives it to you. You, on the other hand, have the duty and responsibility of finding the facts. You are the fact-finding body. You are the judges of the facts and the sole judges of the facts. After you have found the facts, you will apply the law as I give it to you to those facts and reach a correct verdict.

Between us we constitute the court. I am the Judge of the law; you are the judge of the facts.

Now how do you find the facts? You find them from one source only, the evidence and inferences reasonably deducible from the evidence. The evidence consists of what you have heard from the lips of witnesses who have appeared before you, the exhibits which have been received, and nothing more.

You are not permitted to guess or speculate or conjecture as to what occurred. You are limited to the evidence and inferences reasonably deducible from the evidence.

However, in weighing and evaluating the testimony of the
451 witnesses you will apply your common sense and your experiences in life in reaching a view as to their credibility, because being judges of the facts you are of necessity judges of the credibility of the witnesses.

In determining credibility you will take into consideration the manner, demeanor and conduct of the witnesses as they testified, whether they appeared to you to be truth-telling persons or otherwise, their ability or lack of ability to express to you through words what they have seen or heard, their ability or lack of ability to see and hear the things about which they have testified, any bias or prejudice which any witness may have shown which may have distorted his testimony, and any interest in the outcome of the case which may have colored the witnesses testimony, and all those other factors which reasonable persons take into account when they determine whether a statement under oath is true or untrue, or true or half-true.

Now you will approach your task and perform your task fairly and impartially, without sympathy or prejudice or any other emotion. You will not be biased for one side or the other.

Now if you find that either party to this controversy has failed to call a witness who could give material testimony and has given you no satisfactory reason for failing to call that witness, then you may infer
452 that that witness, if called, would give testimony contrary to the side failing to give it.

Now these defendants have taken the witness stand. They have admitted having committed prior criminal offenses. That testimony was admissible for one purpose only, namely, to permit you to consider it when you weigh and evaluate their testimony. You are not to reason that because they committed criminal offenses on prior occasions, they committed these offenses, and you may consider their convictions of prior offenses only for that one purpose, of weighing it on the scales of credibility.

Now the law is that when two or more persons act together in the commission of a crime or aid and abet, counsel or advise each other in the commission of a crime, or act in concert in the commission of a crime, each is responsible irrespective of the part he plays.

Now the burden of proof rests upon the Government to establish the essential elements of the offenses charged beyond a reasonable doubt. I shall give you the essential elements of each of the two counts involved in this indictment before I am through.

Now a reasonable doubt is such doubt as would cause a juror to be so undecided that he cannot say he has an abiding conviction of

453 the defendants' guilt, such a doubt as would cause a reasonably prudent man to hesitate or pause in the graver or more important transaction of life. It is a doubt based on reason for which you can give a reason.

The Government is not required to establish guilt to a mathematical certainty or a scientific certainty. Its burden is to establish guilt beyond a reasonable doubt as I have defined that term to you.

If you have a reasonable doubt as to a defendants' guilt, it is your duty to give him the benefit of that doubt and find him not guilty.

These defendants, as all defendants, enter this case clothed with the presumption of innocence. That presumption abides with him throughout the trial until it has been overcome by evidence which convinces you of guilt beyond a reasonable doubt.

Now you should give close attention to the summations of counsel. They are designed to assist you in organizing and marshaling the facts. However, you should remember that each is an advocate of his particular side, and if anything counsel has said to you is contrary to your recollection of the facts, so far as evidence is concerned, it is your recollection that governs and not theirs, because what they say
454 to you is not evidence.

Now I shall comment on the evidence to some extent, not for the purpose of usurping your function as fact-finders, but for the purpose of assisting you in understanding the issues involved here in this case. And in commenting on the evidence if I state something has been established by the evidence which you believe was not established by the evidence, then you are to rely on your own recollection alone, because what I say to you is not evidence.

Now when you go to the jury room you will take with you the indictment. The indictment is not evidence. It is simply a charge which has been made against these defendants by the Grand Jury after hearing one side of the case. You may only consider it for the purpose of determining the charges that have been preferred.

Now this indictment is in two counts. Each count in effect is a separate indictment, and it is your duty to consider each count separately and render your verdict on each count separate, in respect of each defendant separately.

The fact that you might find a defendant guilty on one charge and not guilty on another doesn't require you, because there are two counts in the indictment, to find him guilty on both counts. It is exactly the same as if there were two indictments combined together
455 for trial.

Now certain verbal statements allegedly made by defendants have been received in evidence. These statements may be considered by you and given such weight as you believe they are entitled to, if you find beyond a reasonable doubt that they were made and were made

freely and voluntarily, were not the result of coercion, threats, intimidation or force of any kind, and were given understandingly and knowingly.

However, these statements can be considered by you in that case only in respect of the defendant making the statement. They are not evidence in respect of the other defendant. In other words, each verbal statement allegedly made by a defendant may only be considered by you in connection with the case against that particular defendant and no other.

You may recall that Sergeant Fallin was being cross examined by Mr. Jones, attorney for Defendant Gatlin in respect of the statement allegedly made by Gatlin, and brought out testimony by Sergeant Fallin that Gatlin said something to him incriminating Miller. Miller's attorney, Mr. McGrail, promptly objected and moved that it be stricken. I granted his motion and directed you at that time to consider the statement only in respect of Gatlin.

456 And I instruct you, even though this be repetition, to strike completely from your minds and not consider any statement you find was made by Gatlin, allegedly involving Miller, and only consider any statement allegedly made by Gatlin in respect of the case against Gatlin, if he made any statement.

Of course, if any statement allegedly made by either defendant was not freely and voluntarily given, it may not be considered at all, because it has no probitive value.

Now Gatlin has testified and his testimony is that he made no such statement as attributed to him by the police officer, but told that he had been gambling with Miller and his brother that evening and also that he had been beaten.

Miller has testified that he at first denied any participation in the Hickory House robbery, but then testified that there was some questioning him, so many people questioning him that he got excited and scared and started crying and previously had been the victim of

police brutality, and admitted everything, but said he committed the robbery alone, but that he then settled down and told the police that he did not mean what he had said.

457 Briefly stated, therefore, and to summarize, you may consider any statement allegedly made by a defendant if you find beyond a reasonable doubt that he actually made it and that it was freely and voluntarily made while in possession of his senses and knowing what he was doing and saying, and then it may be considered only in respect of the case of the defendant making the statement.

Now the first count charges Gatlin and Miller with robbery of the Sher W. Lee store, a delicatessen. As I have informed you, I have directed a judgment of acquittal in favor of Miller insofar as this count is concerned, and you have only the case against Gatlin before you on this count, that is, the first count.

The second count charges Gatlin and Miller with a robbery at the Hickory House Restaurant.

So far as the robbery at the Sher W. Lee establishment is concerned, there is no dispute that a robbery occurred with several persons participating in it. Generally, I think it was said to be three. But Defendant Gatlin denies that he was one of the participants and has offered evidence that he was somewhere else, evidence of an alibi.

The only evidence the Government has to offer on this point

458 is the testimony of the witness Payne who identified Gatlin as one of the participants in the robbery.

Now so far as the second count is concerned, which involves the Hickory House robbery, there is no dispute in that case that a robbery occurred with several persons participating in it.

But the evidence the Government has connecting Gatlin with it is his reported confession which he has denied that he made, and the toy gun and money found on his person at the time of his arrest.

Gatlin denies his participation and has offered evidence that he was somewhere else. That is evidence of an alibi, at a place where

he could not have committed the crime, and denies making the confession, as I have stated.

Now the evidence against Miller consists of the identification of Miller as one of the participants by the witness Manning and his purported confession which he claims he retracted, and which he claims he gave because he was in an emotional state that he would do almost anything that he was asked.

And Miller likewise denies his participation in the Hickory House robbery and has offered evidence that he was somewhere else,
459 or evidence of an alibi.

According to his purported confession, he said he committed the robbery alone. The witnesses testified that there were three participants and that should be considered by you as bearing on the extent of reliability you would place on the confession testimony.

Now, the essential elements of the offense of robbery applicable to Defendant Gatlin in the first count, and to each of the two defendants in the second count, are these: That defendants, acting in concert with and aiding and abetting others, did the following acts:

One: Took the property described in the indictment or some portion of it, that is, secured dominion and control over it; that the property did not belong to him or the others engaged in the taking, and was a thing of value.

Second: Took the property without the consent of the complaining witness.

Third: Took it from the person or immediate actual possession of the complaining witness.

Fourth: Took it by force and violence whether against the resistance of the complaining witness or by sudden or stealthy seizure or snatching or by putting in fear.

460 Fifth: Carried the property away, that is, intending to deprive the owner permanently of the property, and fraudulently to convert it to his own use.

If you find that each and all of these essential elements have been established beyond a reasonable doubt in respect of Gatlin so far as the first count is concerned, your verdict will be guilty as to Gatlin on the first count. If you do not so find, your verdict will be not guilty as to Gatlin on the first count.

If you find that each and all of these essential elements have been established beyond a reasonable doubt in respect of Gatlin or Miller, or both, so far as the second count is concerned, your verdict will be guilty in respect of such defendant or defendants on the second count.

If you do not so find, your verdict will be not guilty in respect of such defendant or defendants on the second count.

Your verdict, therefore, will be in respect of Gatlin on the first count either guilty or not guilty, and your verdict on the second count will be either guilty or not guilty as to Gatlin, or guilty or not guilty as to Miller.

When you go to your jury room you will select your foreman
461 who will preside over your deliberations. Whenever you have reached your verdict, which must be unanimous, you will make that fact known to the Deputy Marshal in whose custody you will be, I shall assemble counsel, and receive it.

Your foreman will announce the verdict, unless the jury is polled, in which case each of you will be required to announce it. You will be asked by the Clerk in respect of the first count how do you find as to Gatlin. Then you will be asked as to the second count, how do you find as to Gatlin. Then you will be asked how do you find as to Miller. It will be either guilty or not guilty in each case.

* * * * *

464 THE COURT: Will you gentlemen come to the bench, please?

(At the Bench:)

THE COURT: My recollection is both of you gentlemen moved for judgment of acquittal on the Government's case.

MR. JONES: Yes, sir.

MR. McGRAIL: Yes, sir.

THE COURT: You didn't do that at the conclusion of the whole testimony in order to avoid some claim being made that you were ineffectively assistants as counsel, I will have that done nunc pro tunc at the end of all the testimony.

MR. McGRAIL: Yes, Your Honor. I was thinking of that.

MR. JONES: May we have that done as to our defendant also, Your Honor?

THE COURT: Certainly.

(In Open Court:)

THE COURT: Bring the jury in.

(Whereupon, at 3:30 p.m., the jurors entered the courtroom and rendered their verdict as follows:)

465 THE CLERK: Mr. Foreman, has the jury agreed upon a verdict?

THE FOREMAN: Yes, we have.

THE CLERK: What say you as to the defendant Paul W. Gatlin, on Count 1 of the indictment?

THE FOREMAN: Guilty as charged.

THE CLERK: On Count 2 of the indictment?

THE FOREMAN: Not guilty.

THE CLERK: As to the defendant Dennis O. Miller on Count 2 of the indictment?

THE FOREMAN: Guilty as charged.

THE CLERK: Members of the jury, your foreman says you find the defendant Paul Gatlin guilty on Count 1; not guilty on Count 2; the defendant Dennis O. Miller guilty on Count 2, and this is your verdict, so say you each and all?

(Affirmative nods.)

* * * * *

[Filed March 8, 1963]

JUDGMENT AND COMMITMENT
[Paul W. Gatlin]

On this 8th day of March, 1963 came the attorney for the government and the defendant appeared in person and by his attorney Thomas R. Jones, Esquire

IT IS ADJUDGED that the defendant has been convicted upon his plea of not guilty and a verdict of guilty of the offense of Violation of Title 22, D.C. Code, Section 2901 Robbery as charged in count one and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Four (4) years to fifteen (15) years

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ DAVID A. PINE
United States District Judge

[Filed March 8, 1963]

JUDGMENT AND COMMITMENT
[Dennis O. Miller]

On this 8th day of March, 1963 came the attorney for the government and the defendant appeared in person and by his attorney Thomas McGrail, Esquire

IT IS ADJUDGED that the defendant has been convicted upon his plea of not guilty and a verdict of guilty of the offense of Violation of Title 22, D.C. Code, Section 2901 Robbery as charged in count two and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Four (4) years to fifteen (15) years

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified offier and that the copy serve as the commitment of the defendant.

/s/ DAVID A. PINE
United States District Judge

[Filed March 15, 1963]

MEMORANDUM

In this case no motions for new trial were filed, and defendants came on for sentence on March 8, 1963. They now have been allowed to appeal in forma pauperis. There was, therefore, no appropriate opportunity for the Court to file a memorandum of its reasons for finding that probable cause existed for the arrests of Gatlin and Miller; that they were legally arrested, and that the alleged confessions and articles seized should not have been excluded as was urged at the trial. I therefore file this memorandum today.

The facts[1/] are as follows:

The police received a report of a robbery in a tavern in southeast Washington at about 2 a.m. Shortly thereafter the police arrived at the tavern, made an investigation, and were informed that the robbery was perpetrated by three colored males. The description, as usual in such cases, was not detailed, but there was some description as to clothing, size and age of the three suspects. The policeman who later made the arrest of Gatlin participated in this investigation at the tavern and received the description given, which was as follows:

That the robbery was committed by three colored males in their midtwenties, 150 to 170 pounds, 6 feet tall, one wearing a light trench coat. This is the description the police officer had when he made the arrest as hereinafter outlined. About 2:40 a.m., the same morning he received a radio call that a cab driver had reported the presence of three suspicious persons in his cab, and was calling from a gas station at South Capitol and Howard Road and that he should proceed to that address. Another officer, Sgt. Fallon, arrived at this address a little before the arresting officer and learned that two of the men had previously left the cab, that a third had fled from the cab at the time it stopped at the gas station, and that it was the latter's actions which prompted the cab driver to call the police. The description received by Sgt. Fallon corresponded with the description given by the lookout after the hold-up at the tavern. The arresting officer, Pvt. Fallin, was a member of the K-9 Corps, and prepared his dog for search in the vicinity of the gas station, but shortly thereafter the dog was injured and the officer was required to return and place him in the police cruiser. The area involved was rough terrain with high grass and junked automobiles. Sgt. Fallon and other officers and the cab driver left the scene, but Pvt. Fallin joined his partner and

---

1/ There is no transcript at this time of the trial, and the facts contained herein are from memory and notes.

remained in the vicinity for about 40 minutes, when they then observed a man emerge from the search area about 100 yards from the gas station and walk away from the gas station in an area some 20 feet from the paved highway. The two officers drove beside him, arrested him and searched him.

The man arrested was a negro wearing a light trench coat, dark brown hat and a white shirt, was about 6 feet tall, weighed about 170 pounds, and appeared to be in his middle twenties, thus answering the description of one of the suspects as contained in the look-out.

The cab driver testified at the trial that he had picked up 3 colored males in southeast Washington and two had left the cab when a police patrol drove behind him, and the third man remained and told him to cross the bridge, but would give no address, that as he reached the gas station on the other side of the bridge he was suspicious, by reason of his fare's unwillingness to give an address, and by reason of a bulge in his pocket, stopped at the station and told the attendant to "stall" while he notified the police, which he did. At that time the fare left the cab and fled to the rear of the gas station.

To be sure the cab driver testified at the trial that the man who fled from his cab was lighter skinned and smaller in height than the defendant and that the defendant Gatlin was not that man. The cab driver gave somewhat the same description to the officers in the patrol car that previously had pulled up behind him, when they arrived at the gas station. There is no evidence that this information was communicated to the police officer making the arrest, but assuming it was, the arresting police officer had before him the description of a man which fitted the description generally, including clothing, of the man arrested, knew that a robbery had been committed in the early hours of the same morning in the same general vicinity, knew that a man acting suspiciously had fled from the cab driver when he drove into the gas station, and defendant was found less than an hour later emerging from the search area, and walking in an area some 20 feet from the side

of the paved highway. In my opinion, an ordinarily prudent and cautious policeman would, under these circumstances, have probable cause to arrest defendant Gatlin, and the testimony of the cab driver in Court that the man who had fled his cab was shorter in stature, was lighter skinned, and was not the defendant would not militate against probable cause based on the information before the officer above set forth existing at the time of the arrest. It must further be borne in mind that this was a deserted and desolate section of the city, that an armed robbery had been committed, that it was at night when defendant was apprehended, and that as a practical matter, little opportunity under such conditions is given for a prudent officer to make discriminating skin comparisons and height measurements, having due regard for his own safety in a hazardous occupation.

It also must not be forgotten that the failure of the cab driver in Court to identify defendant Gatlin as the man who fled his cab might be explained by fear or some other motive.

I therefore find probable cause for the arrest of Gatlin and that his arrest was legally made.

So far as the arrest of Miller is concerned, that came about by reason of a confession by Gatlin, who implicated Miller. On receiving this information the officers, accompanied by Gatlin, set out still in the early morning hours of the same day to apprehend Miller. They first, at Gatlin's suggestion, went to the home of Miller's employer, but not finding him there, next went to the home of a woman friend, at Gatlin's suggestion, first going to an adjacent house, and then proceeding to the correct address. There the police were told that the front door would not open and to go around to the back door when they announced that they were police. They then went to the back door and it was opened. The police went in and were told that defendant was not there. On investigating inside they discovered that the front door had been barricaded, and on further search discovered evidence indicating that a trap door leading to the attic had recently been closed. The police

called to the defendant to come down from the attic, whereupon he opened the trap door and climbed down, there being no staircase leading to the attic. The police arrested defendant and found in the vicinity where he had been hiding a 45 caliber revolver. The revolver was not admitted because of lack of sufficient evidence identifying it with defendant. He was later taken to the robbery squad where he made a confession and was identified in a line-up by one of the victims. Defendant Miller's arrest came about as a result of information received after the legal arrest of Gatlin, and in making the arrest I find that the police had probable cause and observed the amenities required of them, and that his arrest was legally made.

It is therefore my opinion that the confessions and articles taken from defendant Gatlin on being searched should not have been suppressed. I do not find that the recent case of Wong Sung v. United States, _____ U.S. _____, (No. 36) January 14, 1963, to be to the contrary, as contended by defendants.

/s/ David A. Pine
Judge

Date: March 15, 1963

[Certificate of Service]

BRIEF FOR APPELLANTS

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 17,728 and 17,729

PAUL W. GATLIN and DENNIS O. MILLER,

Appellants,

v.

UNITED STATES OF AMERICA

Appellee.

Appeal From Judgments of
The United States District Court
For The District of Columbia

Francis H. Caskin
Gene P. Bond

May, Shannon and Morley
1700 K Street, Northwest
Washington 6, D.C.

Attorneys for Appellants
(Appointed by this Court)

August 12, 1963

STATEMENT OF QUESTIONS PRESENTED

1. Does the Fourth Amendment require the exclusion of a toy pistol and testimony concerning it and the money seized from Appellant Gatlin following his arrest without probable cause?

2. Does the Fourth Amendment require the exclusion of an incriminating statement which was obtained as the result of an invasion of a private home and the arrest of Appellant Miller without probable cause?

3. Do the Fourth Amendment and the purpose of Rule 5(a) of the Federal Rules of Criminal Procedure require the exclusion of the testimony of an identification witness to the extent that the credibility of such testimony is enhanced by and dependent upon the witness' stated participation in police procedures which were illegal because of the unlawful detention of Appellants Gatlin and Miller?

4. Were Appellants entitled to judgments of acquittal as to the single and different charge of robbery for which each was convicted because the evidence was unconvincing and insufficient to support the convictions?

INDEX

TABLE OF AUTHORITIES

Cases:

Constitution, Statute, Rule:

* Cases or authorities chiefly relied upon are marked by asterisks.

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Paul W. Gatlin, No. 17,728

Dennis O. Miller, No. 17,729

Appellants,

v.

United States of America,

Appellee.

APPEAL FROM JUDGMENTS OF THE
UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANTS

I

JURISDICTIONAL STATEMENT

The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1291. An indictment for robbery in two counts was returned against the Appellants Paul W. Gatlin and Dennis O. Miller on December 10, 1962. (J.A.5) Appellants pleaded not guilty on December 14, 1962 and were tried by a jury in the United States District Court for the District of

Columbia. (J.A.6, 7) By judgment of the District Court entered March 8, 1963 Appellant Gatlin was convicted on the first count and Appellant Miller was convicted on the second count. (J.A.128-29) Each Appellant was sentenced to imprisonment for a period of four to fifteen years.

Each Appellant filed a timely notice of appeal from the judgment of conviction below and was permitted to proceed on appeal in forma pauperis by orders of the District Court issued March 8 and 15, 1963.

II

STATEMENT OF THE CASE

1. The Nature of the Case

The indictment contains two counts. The first count charged the Appellants with having taken $110.00 in money from Sher W. Lee, the proprietor of Lee's grocery store, on November 8, 1962 in violation of the District of Columbia Code, Title 22, Section 2901 (Robbery). The second count charged the Appellants with having taken $150.00 in money from Mary O. Manning, an employee of Old Hickory Barbecue, on November 9, 1962 in violation of the aforementioned provision of the District of Columbia Code. On December 14, 1962, each Appellant entered their plea of not guilty to each count.

On January 4, 1963, Appellant Gatlin filed a motion to suppress certain items (namely, a toy gun, a can of motor oil and $50.00 in cash) taken from him at the time of his arrest and any oral confessions or admissions made to the police following his arrest concerning any subject relevant to the indictment.

This motion was denied by the District Court on January 11, 1963. (J.A.6-7).

The trial by jury began February 6, 1963 and concluded February 12, 1963. Shortly after the opening of the trial a testimonial hearing was conducted out of the presence of the jury on the question of the legality of the arrests without warrant of Appellants, as a result of which the trial judge found that there was probable cause for each arrest. Consequently, he ruled that items taken from Appellant Gatlin and statements elicited from him following his arrest should not be suppressed. Similarly, he ruled that statements elicited from Appellant Miller following his arrest should not be suppressed. (J.A.78)[1/] At the close of the Government's case, the trial judge granted Appellant Miller's motion for judgment of acquittal on the first count for lack of proof, the Government having agreed. (J.A.93-6) However, Appellant Miller's motion for judgment of acquittal on the second count and Appellant Gatlin's similar motion on both counts were denied. (J.A.95, 96) Thereafter, at the conclusion of the trial, each Appellant renewed their motions for judgment of acquittal on the counts still pending against them and these motions were denied. (J.A.127).

After deliberation, the jury found Appellant Gatlin guilty of the first count and not guilty of the second count. It found Appellant Miller guilty of the second count. (J.A.127)

1/ The trial judge filed a memorandum on March 15, 1963 in explanation of this ruling. (J.A.129-33)

2. The Facts of the Case

At approximately 3:30 A.M. on the morning of November 9, 1962, Paul W. Gatlin, one of the Appellants here, was arrested by Pvt. James H. Fallin, a member of the Metropolitan Police Department's Canine Corps. (J.A.50, 83) At the time of his arrest Gatlin was walking in a southerly direction along the south side of Suitland Parkway approximately 100 yards from an Esso gas station, which is described below. Appellant testified that the arrest took place as he was walking toward his home at 1238 Howard Road, Southeast, and that he was within three blocks of his home when the police cruiser, manned by Pvt. Fallin and his partner, Pvt. Ray, drove up behind him. (J.A.75)

The police assert the following in justification of Gatlin's arrest. At approximately 2:00 A.M. on that same morning, a robbery had occurred at the Old Hickory Barbecue (sometime referred to as "Hickory"), an all-night restaurant located at 922 8th Street, Southeast in Washington, D. C., on the other side of the Anacostia River and one and one-half miles away from the spot where Gatlin's arrest occurred. (J.A. 54, 80) Following police investigation of that crime, a general description, described as a "lookout", was broadcast by the police department. (J.A.47-9) Pvt. Fallin testified that he received the "lookout" at approximately 2:00 A.M. (J.A.50) According to Pvt. Fallin, the radioed "lookout" consisted of a general description of the perpetrators of the Hickory robbery,

which was as follows:

> "... three colored males, their ages from 25 to 30, medium build; weighing approximately 150 to 160 pounds; six feet of height; and the clothing they wore, dark clothing; light clothing.
>
> "In this particular instant (sic) one of the lookouts read, I recall, it had a light trench coat and the suspects were about six feet tall, weighing 150 or 170 pounds." (J.A.48)

Approximately 30 or 45 minutes after receiving the first broadcast, Pvt. Fallin and his partner received another call to respond to an Esso gas station located at the triangular intersection of South Capitol Street, Suitland Parkway and Howard Road in the Southeast section of Washington, one and one-half miles distant and on the other side of the Anacostia River from the Old Hickory Barbecue. (J.A.46, 83) What prompted this latter call was the report by a cab driver, William Garnett, that a passenger had run from his cab when the cab stopped for gas at the aforementioned gas station. (J.A.41) Nothing in the record suggests that the cab driver knew that a robbery had been committed at the Old Hickory Barbecue at the time he made this report.

The cab driver testified that he had picked up three passengers in the 900 block of 12th Street, Southeast between 2:30 A.M. and 3:00 A.M. and had taken them to their requested destination on Summer Road at which point two of the passengers were discharged. (J.A.40-1) He further testified that while discharging the two passengers, a police car had pulled in behind his cab. This police car is never identified in the

record. At this point, his third passenger decided to remain in the cab and directed the driver to proceed further. (J.A.41) The cab driver became suspicious of the third passenger when he was unable to elicit a specific address from him. Consequently, not wanting to drive around aimlessly, the cab driver pulled into the aforementioned Esso station to get the third passenger out of his cab. The third passenger then got out of the cab and ran behind the Esso station at which point the cab driver lost sight of him. After leaving the gas station, the cab driver encountered the same police car and told its occupants about the actions of the passenger who had fled from his cab. (J.A.41) The record is clear that but for the cab driver's report, the tracking operation later undertaken by the police at the Esso station would not have occurred.

Thereupon, the police car and the cab returned to the Esso station and other police cars soon responded to that location. The cab driver testified that he described the third passenger to the police as a small featured man, 5 feet 8 inches tall, of light brown complexion, wearing a brown tweed overcoat and a hat with a brim. This cab driver observed that this third passenger was carrying something in his overcoat pocket but was unable to say what it was. (J.A.41-3) 2/

2/ At the trial, the cab driver testified repeatedly that Appellant Gatlin was not the "third passenger" who had fled from the cab nor was Gatlin either of the other two passengers who had been discharged on Summer Road. (J.A.42, 44-5)

When Private Fallin arrived at the Esso station, the cab driver and several police cars had already arrived. (J.A. 47) Detective Sgt. Wayland H. Fallin, one of the officers present, had already spoken with the cab driver and had received from the cab driver the aforementioned description of the passenger who had left his cab at the Esso station. (J.A.55, 78)[3/]

Immediately upon arrival at the gas station, Pvt. Fallin prepared his dog for tracking the passenger who, according to the cab driver, had run into the area behind the gas station. Before beginning this tracking operation, however, Pvt. Fallin discussed with the cab driver and the other police officers present the direction in which the passenger had disappeared behind the station. (J.A.47-8) Pvt. Fallin and his dog were engaged in this tracking operation behind the Esso station and in the immediate vicinity across Suitland Parkway from the gas station for approximately 30 to 45 minutes and during that time covered an area of approximately five acres. He also used a light to aid him in his search. However, Pvt. Fallin's dog was injured at this point in time and the tracking operation was abandoned. The testimony is clear that when the tracking was abandoned the dog had not tracked down anyone. (J.A.52,84-5)

3/ It is to be noted that Sgt. Fallin interpreted the cab driver's description of the third passenger as fitting the general description of the broadcast "lookout". However, this interpretation is patently contrary to the uncontradicted testimony of the cab driver himself. This court has recently said, "The conclusion or interpretation of a witness as to the meaning of what someone said is not admissible" De Loach v. United States, 113 App. D.C. 316, 307 F.2d 653, 655 (1962).

Thereupon, Pvt. Fallin returned to Suitland Parkway with his dog in order to receive assistance from his partner. As he approached the parkway, Pvt. Fallin observed that his partner, who apparently had been patrolling over an undescribed route in the police cruiser, was just pulling into the Esso station. Pvt. Fallin was forced to wait for the flow of traffic along Suitland Parkway to clear before crossing that road. (J.A.87) Upon reaching his partner, Pvt. Ray,[4/] at the Esso station, Pvt. Fallin was informed that his partner had just seen a man appear along Suitland Parkway in the vicinity from which Pvt. Fallin had returned. (J.A.47) After placing the injured dog in the police cruiser, Pvt. Fallin and his partner proceeded down the south side of Suitland Parkway to a point approximately 100 yards from the Esso station and at that point encountered the man whom his partner had observed. This man was Appellant Gatlin, who was walking along the south side of the parkway toward his home, three blocks away.

Upon the order of Pvt. Fallin, Appellant Gatlin stopped whereupon Pvt. Fallin arrested him and immediately searched his person. As a result of this search, Pvt. Fallin took from Gatlin a toy revolver and discovered that he was carrying what was described by Pvt. Fallin as "a large amount of change." (J.A.48)

4/ Pvt. Peter Ray did not appear as a witness at the trial. When the trial judge asked for an explanation of Pvt. Ray's absence, the government's attorney stated that he had released Pvt. Ray so that he might leave upon a Florida vacation. (J.A.93)

The record does not disclose that any conversation occurred at this time between the arresting officers and Gatlin. Pvt. Fallin immediately informed police headquarters of the arrest and within a few minutes other police officers, including Sgt. Fallin, appeared upon the scene. (J.A.48, 56) Sgt. Fallin estimated his time of arrival to be approximately 3:40 A.M. (J.A.56) Pvt. Fallin turned over the toy revolver to Sgt. Fallin and Sgt. Fallin completed the search of Appellant Gatlin's person taking some of the $49.17 which Appellant Gatlin had upon his person at the time. (J.A.56-7, 58) After completing this search, Appellant Gatlin was taken, presumably under Sgt. Fallin's supervision, to the robbery squad office at police headquarters. (J.A.57)

Interrogation of Appellant Gatlin began immediately upon arrival at the robbery squad office. Five police officers were present at the interrogation and three of them actually participated in the interrogation itself. (J.A. 80, 82) [5/] Sgt. Fallin testified that Appellant Gatlin was under the influence of intoxicants at the time although it was his opinion that Appellant Gatlin was aware of what he was doing. (J.A.59) However, Detective Sgt. Charles P. Lynn, who was also present at the interrogation, testified that Gatlin was slow in responding and his responses indicated that he "just didn't comprehend for some reason". (J.A.92) This interrogation was concerned solely with the Hickory robbery. (J.A.91)

[5/] The five police officers present were Sgt. Fallin, Sgt. Mark Gray, Detective Charles P. Lynn, Pvt. James Fallin, and his partner Pvt. Peter Ray. Sgt. Gray and Pvt. Ray were not called to testify. (J.A.93)

There is conflicting testimony concerning the nature and length of the interrogation of Appellant Gatlin in the robbery squad office. In the first place, there is testimonial conflict as to whether or not the police interrogation actually elicited incriminating admissions. Appellant Gatlin testified that he made no incriminating statements. (J.A.76) However, the police officers who testified concerning the police interrogation stated that Gatlin not only implicated himself in the Hickory robbery but also named several other persons, including Dennis O. Miller, the other Appellant here. (J.A.59, 64-5, 82)[6/] In the second place, there is conflicting police testimony concerning the length of the interrogation prior to Appellant Gatlin's incriminating admissions which the police assert were made. Sgt. Fallin testified that the admission was elicited after 15 minutes of interrogation whereas Detective Lynn, Sgt. Fallin's partner, testified that the admission was elicited only after an interrogation lasting from 45 to 60 minutes. (J.A.59, 90, 91)

Thereafter, according to the police, they left police headquarters and took Gatlin with them. There were at least seven

---

6/ During his testimony in the presence of the jury, Sgt. Fallin testified that Appellant Gatlin had as a result of police interrogation implicated Dennis O. Miller in the Hickory robbery. (J.A. 81) Because of this, Miller's counsel moved for a mistrial which was denied by the trial judge.

Appellant Gatlin testified that he had only identified Dennis O. Miller as a friend with whom he had spent time during the evening of November 8-9th. (J.A.77)

police officers and four police cars engaged in this operation. (J.A.65, 82, 88) They were all armed. (J.A.82, 88) According to Sgt. Fallin, they stopped for the first time at the home of Miller's employer on Pomeroy Road, Southeast which is a distance of three blocks from where Appellant Miller was arrested. (J.A.65) Thereafter, the police party proceeded to the home of Appellant Gatlin's father at 1238 Eaton Road, Southeast. (J.A.66-7) Except to show that Appellant Miller was not at his employer's home, the record does not disclose what, if anything, the police learned as a result of these two visits.

Finally, at approximately 6:40 A.M., the police went to 1114 Eaton Road, Southeast where Appellant Miller was arrested. (J.A.79) Upon reaching this latter address, the police party surrounded the house. (J.A.82, 88) One of the members of the police party, Pvt. John Alleva, testified that he was a part of the group as the result of responding to a call directing him to go to Eaton Road to look for "one Miller". (J.A.88) Pvt. Alleva, the officer who arrested Appellant Miller, testified that he and two other policemen went to the rear of the house. (J.A.68, 71, 89) After the policemen in front of the house had knocked on the front door, they were told by a woman inside that the front door was broken. (J.A.69, 89) Pvt. Alleva further testified that when the woman opened the back door, he thought that at least one of the police officers at the back door had his gun drawn, although he had difficulty remembering. (J.A.72) When the back door was opened by the woman, the police officers

walked in. (J.A.72-3, 89) The record does not show that the woman said anything to the police after opening the door.[7/] Immediately after entering Pvt. Alleva drew his own gun. (J.A.89) It is clear that the police did not state their purpose before entering; in fact, the record indicates that no purpose was stated by the police until sometime after they had entered the house at which time the police asked the woman if Miller was there and she replied in the negative. (J.A.73)[8/]

Nevertheless, the police conducted a search of the house. After searching the first floor, they proceeded to the second floor. While on the second floor, Pvt. Alleva discovered that someone was standing upon a trap doorway leading to the attic of the house. Pvt. Alleva called to the person to come down and the person complied. It was the Appellant Miller. Thereupon, Pvt. Alleva arrested Appellant Miller at approximately 6:50 A.M. and took him downstairs. (J.A.69-71)

7/ There is nothing in the record to show that the police were invited to enter. The following testimony of Pvt. Alleva suggests the contrary:

"Q. Well, she opened up the door and you were able to get in, but she did not invite you in, did she?

A. I don't remember whether she did or didn't." (J.A.73)

8/ Pvt. Alleva testified:

"I asked, if I remember right, after we were in there a while I asked if Miller was in here, and she said no." (J.A.73)

and

"Q. And was it after you got in the house that you said you were looking for Miller?

A. Yes, I believe so." (J.A.73)

Appellant Miller testified that the home in which he was arrested was the home of his girl friend, Beatrice Snow; he was a frequent guest there and had been given a key to the house by her. (J.A.113) He had arrived there earlier in her absence and had fallen asleep. (J.A.110-11, 114) He was awakened by a banging at the doors and thinking that there were "public assistance" officers at the doors checking upon his girl friend's eligibility for public assistance he went to the attic in order to elude them and was subsequently discovered by Pvt. Alleva. (J.A. 111)

Following his arrest, Appellant Miller was taken by the police to the robbery squad office, arriving there at approximately 7:10 A.M. (J.A.61-2) The police interrogation of Appellant Miller began by their representation to Miller that Gatlin had implicated him in the Hickory robbery. Being confronted with this, Appellant Miller broke down and cried,and, according to the police, he then stated that he alone had committed the Hickory robbery. (J.A.62)[9/]

Thereafter, the police began to notify complainants to report to the robbery squad office for a "line-up".(J.A.62) Presumably, this included those complainants who witnessed the Hickory robbery. The "line-up" was held between 9:00 A.M. and

---

9/ Miller testified that he first denied any involvement in the Hickory robbery but then made an admission, having been brought to a pitch of high excitement by his questioners. He quickly recanted, however. (J.A.112)

10:00 A.M. on the same morning. (J.A. 109)

It is also apparent from the record that at this time the police also notified other complainants concerned with robberies other than the Hickory robbery to come to police headquarters for a line-up. Thus, Sher W. Lee, the sole proprietor of a grocery store at 1201 F Street, Northeast Washington, testified in this case that he visited police headquarters at the request of the police on the morning of November 9th for the purpose of a "line-up". (J.A.9) Mr. Lee testified that he was unable at this "line-up" to identify anyone as a participant in the robbery of $110 which was taken from his grocery store at approximately 8:50 P.M. on the night before. (J.A.10) Charles F. Payne, who witnessed the Lee grocery store robbery, also was at police headquarters on the morning of November 9th for the purpose of a "line-up" at which he identified Appellant Gatlin. (J.A.17-8) Payne also testified at the trial.

Following the "line-up" or "line-ups", the police continued to detain the Appellants in the robbery squad office. Each Appellant remained there until brought before the U. S. Commissioner at 1:22 P.M. in the afternoon of November 9th for a preliminary hearing on a complaint charging them only with the Hickory robbery. (J.A.1-2, 80) There is nothing in the record to reveal that prior to this time the Appellants Gatlin and Miller had been informed of their rights by the police. The U. S. Commissioner ordered Appellants Gatlin and Miller held for the Grand Jury. Thereafter, as indicated above, each Appellant

was indicted by the Grand Jury for robbery in two counts, one count dealing with the Hickory robbery and the other count dealing with the Lee robbery. (J.A.5)

During the trial, Mary O. Manning and Alta Wilson, waitresses at Old Hickory Barbecue on duty at the time of the robbery, testified. Of these witnesses, only witness Manning made any identification. Manning was unable to identify Appellant Gatlin but did identify Appellant Miller as one of two men who entered Old Hickory Barbecue on November 9th "and held it up". (J.A.28, 30)[10/] She testified that Appellant Miller at the time was wearing a plaid or checked top coat "between a blue and a gray" in color and a gray hat. (J.A.33) Sgt. Fallin testified that at the time of the "line-up" Appellant Miller was wearing "a dark brown overcoat, with a slight check" and a brown hat. (J.A.108) Consequently, the evidence pointing to Appellant Miller's implication in the Hickory robbery is witness Manning's testimony and the police testimony concerning Miller's oral admissions.

Insofar as the Lee robbery is concerned, two identification witnesses were called by the government.[11/] Each testified that at approximately 8:50 P.M. on November 8, 1962, three men entered

---

10/ Miller's trial counsel unsuccessfully objected to the admission of this identification testimony as the product of an illegal arrest. (J.A.30)

11/ Sher W. Lee, sole proprietor of Lee's grocery store, and Charles F. Payne, a customer who was in the store at the time of the robbery. The police knew the names of other customers in the store at that time but they were not called as witnesses by the Government. (J.A.8, 14, 18-9)

the Lee grocery store and proceeded to take approximately $110 from the cash register at gun point. (J.A.8-9, 14-5) Witness Lee was unable to identify either Gatlin or Miller as one of the participants. (J.A.10) Witness Payne did identify Gatlin as a participant. (J.A.17) He also testified that the man whom he could identify carried a gun with a shiny silver veneer and wore a top coat and head piece. (J.A.20-1) Consequently, the evidence connecting Appellant Gatlin with the Lee robbery is witness Payne's testimony, the toy pistol taken from Gatlin at the time of arrest, and police testimony concerning the pistol and the money taken from Gatlin at the time of his arrest.

III

STATUTES, CONSTITUTIONAL PROVISIONS, AND RULES INVOLVED

United States Constitution

AMENDMENT IV -

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Federal Rules of Criminal Procedure

RULE 5(a)

> "Appearance before the Commissioner. An officer making an arrest under a warrant issued upon a complaint or any person making an arrest without a warrant shall take the arrested person without unnecessary delay before the nearest available commissioner or before any other nearby officer empowered to commit persons charged with offenses against the laws of the United States. When a person arrested without a warrant is brought before a commissioner or other officer, a complaint shall be filed forthwith."

District of Columbia Code (1961 Ed.)

§22-2901 - ROBBERY

> "Whoever by force or violence, whether against resistance or by sudden or stealthy seizure or snatching, or by putting in fear, shall take from the person or immediate actual possession of another anything of value, is guilty of robbery, and any person convicted thereof shall suffer imprisonment for not less than six months nor more than fifteen years." (March 3, 1901, 31 Stat. 1322, ch. 854, §810.)

IV

STATEMENT OF POINTS

1. Appellant Gatlin having been arrested without probable cause, it was prejudicial error to deny his motion for suppression of evidence obtained by the police as a result of the illegal arrest.

2. Appellant Gatlin's detention following arrest having also been in violation of Rule 5(a) of the Federal Rules of Criminal Procedure, it was clear prejudicial error to admit any evidence obtained by the police during such unlawful detention.

3. It was error to deny Appellant Gatlin's motion for judgment of acquittal because the evidence lacked the convincing quality legally required to support his conviction.

4. Appellant Miller having been arrested without probable cause and by virtue of an illegal police entry into a private home, it was prejudicial error to deny his motion to suppress evidence elicited from him as a result of the illegal arrest.

5. Appellant Miller's detention following arrest having also been in violation of Rule 5(a) of the Federal Rules of Criminal

Procedure, it was clear prejudicial error to admit any evidence obtained by the police during such unlawful detention.

6. It was error to deny Appellant Miller's motion for judgment of acquittal because the evidence was insufficient to support his conviction.

V

SUMMARY OF ARGUMENT

I. Appellant Gatlin was arrested without probable cause for a robbery which had previously occurred at the Old Hickory Barbecue, an all-night restaurant in Southeast Washington. At the time he was walking toward his home along a well-travelled highway. Prior to the arrest, the police had received a "lookout" broadcast which described in the most general and sketchy terms the three persons who had committed the Hickory robbery. Also prior to the arrest, the police had received a report from a cab driver concerning his difficulty with a passenger who had been unwilling to state his destination and had subsequently run from the cab after the driver had stopped at a gas station. The record fails to show any reasonable relationship between the robbery and the event reported by the cab driver.

Having responded to the gas station described by the cab driver, the police instituted a canine tracking operation in search of the passenger who had fled the cab. This tracking operation produced no results. However, after abandoning the tracking, the police observed a man (Appellant Gatlin) walking along the Suitland Parkway, a well-travelled dual highway running

through the area which had been tracked. Thereupon, the police summarily arrested Gatlin, whose conduct upon being arrested provided no reasonable ground for suspicion. This arrest lacked probable cause becuase the only information available to the police concerning the Hickory robbery was the lookout whose generalized content provided insufficient basis for a belief that Gatlin had committed the Hickory robbery. Since the arrest was illegal, it was erroneous to admit a toy pistol and testimony concerning it and a sum of money taken from him following arrest. The use of this evidence was prejudicial becuase the Government at the trial relied upon it to connect Gatlin with another robbery involving the Lee grocery store, for which he was convicted.

The ten hour period which elapsed between Gatlin's arrest for the Hickory robbery and the preliminary hearing concerning that charge was an illegal detention ab initio because of the illegal arrest. It also constituted unnecessary delay in violation of Rule 5(a) of the Federal Rules of Criminal Procedure bocause during that period the police subjected Gatlin to a line-up concerned with another crime (i.e. the Lee robbery) although the police had no information connecting Gatlin with that crime. It was clear error to permit the Government to exploit the illegal arrest and detention of Gatlin by eliciting from the only witness who identified Gatlin testimony to the effect that he had previously identified Gatlin at the aforementioned Lee line-up. In light of the patent weaknesses in this witness' testimony, it is clear that the credibility of his testimony must have been immeasurably enhanced, in the minds of the jury, by the witness'

reference to his identification of Gatlin at the illegal Lee line-up. Therefore, the testimony of this witness as presented should have been excluded because it constituted evidence on behalf of the Government which was obtained by illegal police procedures.

II. Appellant Miller was also arrested for the Hickory robbery. The only basis for the police's suspicion that he might have been involved is uncorroborated information allegedly elicited by the police from Appellant Gatlin during the latter's unlawful detention. This information was insufficient to establish probable cause for Miller's arrest because its source was an intoxicated man, a victim himself of unlawful police detention at the time, whose reliability had not been previously tested by the police. Miller's arrest was also unlawful because it was effectuated without a warrant and by a forcible entry into a home legitimately occupied by Miller without a prior statement of purpose by the police. Following Miller's arrest, the police elicited an incriminating statement from him and testimony concerning this was admitted at the trial over objection. It was prejudicial error to admit this evidence which resulted directly from the illegal arrest.

Following the illegal arrest and the incriminating statement which occurred at approximately 7:15 A.M., Miller was detained for over six hours and during this period was subjected to line-ups dealing with a wholly unrelated robbery (i.e. the Lee robbery) as well as the Hickory robbery. The police had no information connecting Miller with the Lee robbery. Consequently, these line-ups unnecessarily delayed Miller's preliminary hearing

concerning the crime for which he was arrested, and were therefore, also violative of the aforementioned Rule 5(a). The testimony of the one witness who identified Miller as a participant in the Hickory robbery is clearly based upon her participation in these illegal line-ups. It was clear prejudicial error to permit the Government to bolster and enhance the credibility of this witness' testimony in this manner. This amounted to nothing less than an improper exploitation by the Government of evidence obtained as a direct result of Miller's unlawful detention by the police. Therefore, this testimony as presented should have been excluded.

VI

ARGUMENT

A. It Was Prejudicial Error To Admit Various Evidence Obtained By The Police As A Result Of The Illegal Arrest And Illegal Detention Of Appellant Gatlin

The arrest without warrant of Appellant Gatlin on the police's suspicion of his participation in the robbery of the Old Hickory Barbecue was illegal because it lacked probable cause, as we shall demonstrate below. Consequently, the admission in evidence of a toy pistol (Government's Exhibit No. 1) and the testimony of police officers concerning the toy pistol and $47.19 in money seized from Appellant Gatlin following his illegal arrest was prejudicial error. Moreover, admission in evidence of police testimony regarding incriminating statements concerning the Hickory robbery, which were allegedly made by Gatlin as a result of interrogation following his illegal arrest, was also in error.[12/]

Although the jury found Gatlin not guilty of the Hickory robbery, the admission of the toy pistol and the police testimony in regard to it and the money seized from him was clearly prejudicial because the jury did find Gatlin guilty of the Lee robbery, having before it this evidence by which the Government openly sought to connect him with both the Lee and Hickory robberies.

12/ Because his arrest was unlawful, any detention resulting from such arrest was unlawful. To the extent that such detention was unlawful for the additional reason that it violated Rule 5(a) of the Federal Rules of Criminal Procedure, this will be discussed in Section A(2), infra.

(1) The arrest of Appellant Gatlin lacked probable cause

Appellant Gatlin was arrested without warrant on police suspicion of his implication in the Hickory robbery. In the absence of an actual observance of the felony, a police officer must establish that there was probable cause to believe that the person arrested was guilty of the felony to justify abridgment of that person's liberty. As Judge Bazelon has stated:

> "The exigencies of law enforcement require that a police officer be permitted to make an arrest when he has probable cause to believe a person guilty of a felony. Ordinarily he must present what he knows to a magistrate on an application for a warrant, so that the decision whether or not to arrest may be made as judiciously as possible." Jones v. United States, 105 App. D.C. 326, 329, 266 F.2d 924, 927 (1959).

Although the arrest of Gatlin was made without warrant, it is clear that the constitutional standard for evaluating the legality of his arrest without warrant is as at least as stringent as the requirements which must be met before a warrant for arrest will be issued by a judicial officer. Wong Sun v. United States, __ U.S. ___, 9 L.ed 2d 441, 450 (1963). Wrightson v. United States, 95 App. D.C. 390, 222 F.2d 556 (1955). Thus, as the Supreme Court said in the Wong Sun case, it is required that an arrest with or without warrant be based upon more than mere suspicion. To be lawful, an arrest without warrant must be based upon evidence which would warrant a man of reasonable caution in the belief that a felony has been committed and that the person being arrested has committed it. This Court has enunciated the same standard by which the

legality of arrests without warrant are to be judged. [13] Bell v. United States, 102 App. D.C. 383, 254 F.2d 82 (1958).

This is the standard of "probable cause" for arrest, which, if not satisfied, results in the deprivation of those constitutional rights of the arrested person which are guaranteed to him by the Fourth Amendment to the United States Constitution. Henry v. United States, 361 U.S. 98 (1959); Giordenello v. United States, 357 U.S. 480 (1958); Johnson v. United States 333 U.S. 10 (1948); United States v. Di Re, 332 U.S. 581 (1948); Boyd v. United States, 116 U.S. 616, (1886); Wrightson v. United States, supra.

As the Supreme Court and this Court have stated, when the question of the illegality of an arrest is an issue, as in this case, it is necessary to resolve that question in the light of the particular factual circumstances involved. Rios v. United States, 364 U.S. 253 (1960); Henry v. United States, supra; Bell v. United States, supra. Consequently, we now turn to the facts and circumstances of this case. It is of crucial importance to ascertain the information within the arresting officer's knowledge at the time of Appellant Gatlin's arrest.

---

[13] In the Bell case, Judge Prettyman stated:

> "The sum total of the reams that have been written on the subject is that a peace officer may arrest without a warrant when he has reasonable grounds, in the light of circumstances of the moment as viewed through his eyes, for belief that a felony has been committed and that the person before him has committed it." (102 App. D.C. at 388, 254 F.2d at 87)

A robbery having occurred at the Old Hickory Barbecue located at 922 8th Street in Southeast Washington at 2:00 A.M. on November 9, 1962, a "lookout" was broadcast by the police department consisting of nothing more than a very general and sketchy statement describing the perpetrators as three colored males, six feet tall, of medium build, weighing between 150 and 170 pounds, and wearing light and dark clothing. One of the suspects, according to the lookout, wore a light trench coat.

This broadcasted lookout was received by Pvt. James Fallin while he and his partner, Pvt. Ray, who are both members of the Canine Corps, were patrolling in their cruiser. At approximately 2:30 A.M., Pvt. Fallin received a second call to respond to an Esso gas station, located at the triangular intersection of South Capitol Street, Suitland Parkway and Howard Road in the Southeast section of Washington, to investigate a cab driver's report that a passenger had run from his cab when he stopped at the Esso station. The record provides little or no basis for an inference that the event, as reported to the police by the cab driver had any reasonable relationship to the Hickory robbery. There is nothing to show that the cab driver was aware that the Hickory robbery had occurred when he made his report. Furthermore, the cab driver testified that from the beginning he had told the police that the passenger who had left his cab was a small featured man of light brown complexion, 5 feet 8 inches tall, and wearing a brown tweed overcoat. Although Detective Sgt. Wayland H. Fallin testified that the cab driver's report "fitted" the

lookout description, Sgt. Fallin never disputed the fact that the aforementioned description was the one given to the police by the cab driver. Thus, Sgt. Fallin's conclusory statement interpreting what the cab driver told him can be given no weight because it was without reasonable basis. See De Loach v. United States, 113 App. D.C. 316, 318, 307 F.2d 653, 655 (1962).

When Pvt. Fallin arrived at the Esso station, he ascertained the direction in which the cab driver's passenger had fled behind the Esso station and immediately initiated a tracking operation with his dog. The tracking was terminated without results approximately 30 to 45 minutes after it had begun because the dog was injured. After waiting for the flow of traffic[14/] to clear on Suitland Parkway, Pvt. Fallin crossed the highway and returned to the Esso station. His partner was just then returning to the Esso station after having patrolled an undescribed route in the cruiser. Pvt. Fallin was then told by his partner, who was never called to testify in this case, that the partner had just observed a man walking along Suitland Parkway in the vicinity from which Pvt. Fallin had returned. Pvt. Fallin and his partner thereupon overtook the man in their cruiser and, upon directing him to stop, they arrested him without asking any questions. Pvt. Fallin testified that the man was wearing a light trench coat and brown hat (R.89). The place of the arrest was approximately 100 yards

---

14/ The fact that traffic was flowing on Suitland Parkway at this time would indicate lack of support for the trial judge's finding this was a "deserted and desolate section of the city". (J.A.132)

from the Esso station along the South side of Suitland Parkway. The man arrested was Appellant Gatlin. Gatlin testified that he was at the time walking to his home at 1238 Eaton Road, Southeast, which was three blocks away.

The chain of events leading to this arrest makes clear its illegality. The arresting officer had knowledge of a police lookout which had been broadcast shortly after the Hickory robbery. This lookout for three six-foot colored males was of a vague and generalized character. In itself, this description would describe untold numbers of persons in the City of Washington and by itself could afford no reasonable basis for arresting a lone colored male walking home along a well-travelled thoroughfare in Southeast Washington. See Ellis v. United States, 105 App. D.C. 86, 264 F.2d 372 (1959), cert. denied 359 U.S. 998.

Furthermore, it is clear that Pvt. Fallin was at the Esso station, which is located at least one and one-half miles from the Old Hickory Barbecue on the opposite side of the Anacostia River, only becuase a cab driver had reported to the police approximately 30 minutes after the Hickory robbery that a passenger, whose description as given to the police at the time by the cab driver was inconsistent with the lookout, had fled his cab at the Esso station. As far as the record discloses, the man who fled the cab was never apprehended. The arresting officer conceded that it was possible that Appellant Gatlin was not the man who had fled from the cab. (J.A.86) The cab driver corroborated this by testifying unequivocally that Appellant Gatlin was not the man who had fled from his cab. (J.A.43-4)

In light of the foregoing, it is reasonable to draw two conclusions. First, there is insufficient basis for the assumption made by the police that the fleeing passenger had a connection in some way with the Hickory robbery. Secondly, it is not reasonable to say that Appellant Gatlin was the passenger who had fled from the cab. Thus, we are left with the generalized lookout as the only possible basis for a belief that Appellant Gatlin had participated in the Hickory robbery. It is to be noted that upon being accosted by the police, Appellant Gatlin's conduct could not have given the police any reasonable cause for suspicion. He was walking when overtaken by the police and promptly obeyed their command to stop. Whereupon he was immediately arrested with no questions asked. The record does not even disclose that the arresting officer asked Appellant Gatlin to identify himself or to explain his presence at the point where he was accosted, assuming arguendo that his presence there required an explanation.

If a generalized lookout of the nature involved here could be said to establish probable cause for arrest, it would amount to a holding that arrest on vague suspicion is justified. Such a lookout could as easily be used to justify drag-net searches for many persons who would meet its imprecise specifications. Indeed, it cannot even be said on the basis of the record, that Appellant Gatlin met those imprecise specifications. The record discloses only that, according to the arresting officer, Appellant Gatlin was wearing a trench coat, brown hat and white shirt when arrested. There is nothing more in the record which in any way

describes his physical characteristics at the time of arrest or even compares them with the sketchy description in the lookout.

As the Supreme Court has recently reiterated in the Wong Sun case, supra:

> "The history of the use, and not infrequent abuse, of the power to arrest cautions that a relaxation of the fundamental requirements of probable cause would 'leave law abiding citizens at the mercy of the officers' whim or caprice'" (9 L.ed 2d at 450).

It should be concluded, therefore, that Appellant Gatlin's arrest was illegal because of lack of probable cause.

Following Gatlin's arrest, the police took from his person a toy pistol and $47.16 in money. It is, of course, well settled that the validity of an arrest cannot be proven by its fruits. United States v. Di Re, supra, at 595. Over objection, the toy pistol was admitted in evidence as well as police testimony concerning the pistol and the money which had been taken from him. Because of the illegal arrest, this evidence, which was seized as a result of that arrest, was inadmissible. Mapp v. Ohio, 367 U.S. 643 (1961); Williams v. United States, 99 App. D.C. 161, 237 F.2d 789 (1956).

This erroneously admitted evidence was an inextricable part of the evidentiary presentation of the Government designed to implicate Appellant Gatlin in the Lee robbery and was clearly prejudicial to him for that reason. In overruling objection to its admissibility, the trial judge placed no limitation upon the use to be made of this evidence. Indeed, Government's counsel, in the presence of the jury, related the toy pistol seized from

Gatlin with the Lee robbery by asking him the following question, which he answered in the negative:

> "Isn't it a fact that you had this gun [i.e. the toy pistol] earlier in the evening and you used it to commit the hold-ups at Sher Lee's grocery store and Hickory House?" (J.A.106)

This evidence, together with the identification testimony of one witness to the Lee robbery, was the basis for the jury verdict finding Gatlin guilty of that robbery. Since the evidence concerning the toy pistol and the money seized from Gatlin following his illegal arrest was admitted in violation of his constitutional right under the Fourth Amendment to be free from illegal arrest, the admission of this evidence vitiated Gatlin's conviction for the Lee robbery, regardless of its prejudicial effect. Payne v. Arkansas, 356 U.S. 560 (1958); United States v. Kobli, 172 F.2d 919, 921 (3d Cir. 1949); Tanksley v. United States, 145 F.2d 58, 59 (9th Cir. 1944). But in any event, it can reasonably be assumed that this erroneously admitted evidence had a substantial influence on the jury in rendering its verdict of guilty. Leigh v. United States, 113 App. D.C. 390, 308 F.2d 345 (1962).

(2) The detention of Appellant Gatlin following his illegal arrest was also violative of Rule 5(a) of the Federal Rules of Criminal Procedure

Following Appellant Gatlin's illegal arrest at 3:30 A.M., he was interrogated concerning the Hickory robbery by a team of officers in the robbery squad office at police headquarters. As a result of this interrogation, which was concerned solely with the Hickory robbery, he implicated himself in the Hickory robbery according to police testimony. The record fails to show

that any effort was ever made by the police prior to their interrogation or thereafter to inform Gatlin of his rights. The interrogating police officers testified that despite Gatlin's intoxicated state, they believed his incriminating admission. Nonetheless, the police made no effort to bring Gatlin before a judicial officer for the purpose of a preliminary hearing on the Hickory robbery. The fact is that Gatlin was not taken before the U. S. Commissioner for a preliminary hearing until 1:22 P.M. on November 9th, at which time he was charged solely with the Hickory robbery. This was approximately 10 hours following his illegal arrest.

In the lengthy period which elapsed between the alleged incriminating admission and the preliminary hearing, the following events occurred:

(1) The police compelled Gatlin to accompany them upon a search lasting at least 2 hours for another man sought in connection with the Hickory robbery.

(2) Gatlin was subjected to a line-up or line-ups starting at approximately 9:00 A.M. at police headquarters during which complaining witnesses concerned with the Hickory robbery and at least one other robbery [i.e. the Lee robbery] were permitted to view Gatlin.

As best can be determined from the record below, two waitresses who had witnessed the Hickory robbery and two witnesses of the Lee robbery were present at the line-up or line-ups. No

explanation was offered by the police at the trial showing that they had established any relationship between Gatlin and the Lee robbery prior to the holding of the Lee line-up. However, the record is clear that Gatlin had been arrested on suspicion of his implication in the Hickory robbery alone and the interrogation prior to the Lee line-up had dealt solely with the Hickory robbery.

The two Hickory witnesses were unable to identify Gatlin at the time of the Hickory line-up or at the trial. Of the 2 Lee robbery witnesses who appeared at the Lee line-up, only Charles F. Payne identified Gatlin. Although the identification testimony of the witness Payne indicates that he identified Gatlin at the trial, his testimony also demonstrates that his ability to so testify was aided in immeasurable degree by the line-up in which he had participated.[15/]

Rule 5(a) of the Federal Rules of Criminal Procedure provides that following an arrest without warrant, the arrested person must be taken "without unnecessary delay" before a judicial officer for a preliminary hearing upon the charge for which the arrest was made. This Court has made clear that the requirements of Rule 5(a) do not permit the police to justify unnecessary delay by claiming the unavailability of a committing magistrate. In the words of this Court, "both by law and practice ... application for hearing might have been made to ... committing magistrates at

---

15/ The inadmissible aspect and insubstantial nature of the testimony of this witness at the trial itself will be discussed infra.

any hour." Akowskey v. United States, 81 App. D.C. 353, 354, 158 F.2d 649, 650 (1946); Jones v. United States, 113 App. D.C. 256, 258, 307 F.2d 397, 399 (1962). Of course, the police made no effort to seek a magistrate in this case until 10 hours after the arrest.

We do not concede the legality of the interrogation following Gatlin's arrest which was obviously designed to elicit damaging statements from Gatlin to support his illegal arrest. See Jackson v. United States, 106 App. D.C. 396, 273 F.2d 521 (1959). However, it is clear a fortiori that when the damaging statement concerning the Hickory robbery had been elicited, any further delay in bringing Appellant Gatlin before a committing magistrate was "unnecessary" in violation of Rule 5(a).[16/] During this period of unnecessary delay following his alleged admission, Gatlin was subjected to a line-up which involved a wholly unrelated crime. Surely, it cannot be said that the line-up for the Lee robbery was conducted for the purpose of verifying through third parties the alleged admission of Gatlin which dealt with the Hickory robbery only. Mallory v. United States, 354 U.S. 449 (1957). Neither can the Lee line-up be classified as an ordinary administrative step required to bring a suspect before the nearest available magistrate.[17/]

16/ Neither do we concede, of course, that any detention of Gatlin was lawful in view of the fact that the arrest itself was unlawful.

17/ Indeed, in the 10 hour period which elapsed between Gatlin's arrest and the preliminary hearing, the police did not even undertake the ordinary administrative step of "booking" him. It was not until after the preliminary hearing concerning the Hickory robbery that he was "booked" on that charge.(J.A.74)

The Lee line-up, therefore, was unlawful because it was held during a period of unlawful detention. In other words, Gatlin's preliminary hearing on the Hickory robbery charge was unnecessarily delayed in order to hold a line-up about another crime for which Gatlin had not been arrested and as to which the police had nothing indicating Gatlin's involvement. See Coleman v. United States, __ App D.C. ___, F.2d (#17444, decided April 19, 1963); United States v. Meachum, 197 F.Supp. 803 (D.C. D.C. 1961)

The record shows that a part of the Government's presentation tending to connect Gatlin with the Lee robbery was the testimony of witness Payne who was one of those who viewed Gatlin during the Lee line-up. It was wholly improper to permit the Government's attorney to question witness Payne concerning his participation in this illegal line-up. In light of the insubstantial nature of the witness Payne's testimony at the trial several months after the Lee robbery, the importance of his testimony concerning his identification of Gatlin at the illegal line-up on the day following the Lee robbery cannot be underestimated.[18/] Therefore, it was plain error on the part of the Government, which affected substantial rights of Appellant Gatlin, to ask questions of witness Payne in this regard.

18/ The inadmissibility of this important part of witness Payne's testimony will be treated further in conjunction with the discussion, infra concerning the insubstantial nature of Payne's testimony.

B. It was Prejudicial Error To Admit Various Evidence Obtained By the Police as a Result of the Illegal Arrest and Illegal Detention of Appellant Miller

Appellant Miller's arrest was illegal for several reasons. In the first place, the arrest was made without probable cause. In the second place, the circumstances prevailing prior to Miller's arrest imposed a clear requirement upon the police to seek an arrest warrant rather than to permit them to evaluate for themselves the substantiality of their reasons for desiring to arrest Miller. Thirdly, Miller's arrest without warrant was illegal because it was accomplished by a forcible entry by the police, without a prior statement of their purpose, into a private home legitimately occupied by Miller. Following the illegal arrest, Miller was brought before the U.S. Commissioner for a preliminary hearing only after an unnecessary delay which violated Rule 5(a). We shall deal with these various matters in this section.

(1) Miller's arrest lacked probable cause

Appellant Miller was arrested by the police at approximately 6:50 A.M. on November 9, 1962 inside a private residence at 1114 Eaton Road, Southeast Washington. This arrest without warrant was the direct result of information allegedly supplied to the police by Appellant Gatlin. Following the arrest of Gatlin, the illegality of which we have discussed supra, the police interrogated Gatlin concerning the Hickory robbery. As a result of this interrogation, the police testified that Gatlin implicated himself as well as at least four other persons including Dennis O. Miller;

Gatlin testified to the contrary and explained that he had named Dennis O. Miller and others to the police as persons with whom he had associated during the evening hours preceding his arrest.

The alleged tip by Gatlin is the only information which the police had which tended to connect Appellant Miller with the Hickory robbery. It is clear that the police, in arresting Miller, placed no reliance upon the generalized lookout concerning the Hickory robbery, which had been previously broadcast. The only possible information supplied to them by that lookout, which was relevant to their arrest of Miller, was that three persons, rather than any other number, had perpetrated the Hickory robbery. As we shall show below, the officer who arrested Miller made the arrest on a practically sight-unseen basis. Thus, it becomes clear that, as a practical matter, the only knowledge upon which the police based their belief that Miller had committed a felony was the information allegedly supplied to them by Gatlin.

Furthermore, it should be noted that two of the police officers, who were present at Gatlin's interrogation, testified that Gatlin was obviously intoxicated. According to them, he acted sleepy; he was slow in his responses; and he "just didn't seem to comprehend" the questions posed by the police. Gatlin's intoxicated state was corroborated by the testimony of Gatlin himself. Of the five police officers present at the interrogation, three were asking him questions. It is also to be noted that there is nothing in the record to show that, following Gatlin's arrest, the police made any effort to ascertain anything

about his background. As far as the police were concerned, Gatlin was an unknown quantity.[19/]

In view of the foregoing, it was wholly unreasonable for the interrogating officers to have relied upon Gatlin's alleged tip as the basis for arresting Miller without warrant. Neither should it be ignored that this alleged tip resulted from the police's exploitation of Gatlin's illegal arrest. In any event, it is clear that at the point in time when the police left police headquarters with Gatlin in tow following the latter's alleged statement implicating Miller, they were without probable cause for arresting Miller.

Even assuming that Gatlin made a statement implicating Miller and others, his status at that time amounted to nothing more than that of an untested informer. Wong Sun v. United States, supra; Wrightson v. United States, supra; see United States v. Jackson, 159 F.Supp. 845 (D.C. D.C. 1958). Information implicating another in a felony which is received from a source whose reliability has not been tried and tested by experience cannot be claimed by the police as sufficient basis, by itslef,

---

19/ There is no rational basis for assuming any relationship between Gatlin and Miller insofar as the Hickory robbery is concerned. At the trial, none of the Hickory identification witnesses connected Gatlin with the Hickory robbery. The mere fact that the police had arrested Gatlin on suspicion of the Hickory robbery supplied no added reliability to his alleged tip implicating Miller in the Hickory robbery. Wong Sun v. United States, supra. And viewed from the jury's point of view, it found Gatlin not guilty of the Hickory robbery despite the testimony of the interrogating officers who asserted that Gatlin had implicated himself and Miller in the Hickory robbery.

for a reasonable belief that the implicated person committed the felony. This state of the law has solid foundation in reason.

Judge Bazelon of this Court has stated that only the exigencies of law enforcement can ever justify an arrest by the police without warrant in the first place and has noted the great added danger of permitting arrest without warrant on the basis of information supplied by an untested informer. He has observed that:

> "... This compromise [i.e. arrest without warrant], which is dictated by necessity, transfers from the judicial officer to the police officer the delicate judicial function of determining, in the first instance, whether there is probable cause. The dangers are plain. They would be increased beyond limits tolerable in a free society if the law allowed the police officer to arrest solely on the basis of an informer's uncorroborated assertions. For this would give the informer the delicate function which the law generally reserves for the judicial officer and allows the police officer to exercise only in limited situations. The considerations which justify delegation of the judicial function to police officers do not justify a further delegation to their informants." Jones v. United States, 105 App. D.C. 326, 329-30, 266 F.2d 924, 927-28 (1959).

The record is quite clear that following Gatlin's interrogation, the police went looking primarily for one man although, according to them, Gatlin had named at least four other persons. They took Gatlin, who was under arrest, with them on this search. It is appropriate to examine the events which transpired following the police's departure from headquarters. As far as the record discloses, they left police headquarters shortly after 4:20 A.M. and the arrest of Miller did not occur until 6:50 A.M. During that period of time, the party of at least seven armed policemen and Gatlin riding in 4 cruisers made at least three stops, all of which were in the near vicinity of the place of Miller's

eventual arrest. They stopped at the home of Miller's employer, Appellant Gatlin's home, and finally at 1114 Eaton Road where Miller was arrested. This drag-net search uncovered nothing connecting Appellant Miller with the Hickory robbery.

When the police arrived at 1114 Eaton Road, the armed policemen surrounded the house. They then knocked on the front door and the woman who answered the door asked them to come around to the back because the front door could not be opened. The three policemen covering the back door were informed of this. One of them testified that when the woman opened the back door, they identified themselves and walked in.[20/] Sometime after their entry, the police asked the woman whether Miller was there and she replied in the negative. Shortly thereafter, Appellant Miller was arrested inside the house.

The arresting officer, Pvt. Alleva, explained that he and his partner had participated in this operation because of a call, which they had received while cruising, directing them "to go to Eaton Road to look for one Miller". As far as the record shows, this is essentially the extent of the knowledge of the arresting officer himself. When Pvt. Alleva was on the second floor of the house he discovered that "someone" was in the attic. He ordered that "someone" to descend. When he did, Pvt. Alleva, with gun drawn, arrested that "someone" without even advising him why he was being arrested. Except for Pvt. Alleva's identification of Appellant Miller at the trial as the man whom he had arrested at 1114 Eaton Road, there is nothing in the record to

---

20/ We shall show in the following section of this brief that this entry was unlawful in the circumstances.

show that Pvt. Alleva even knew that the man whom he was arresting was Dennis O. Miller.

Thus, it is clear that the police acquired no corroborating information connecting Appellant Miller with the Hickory robbery as a result of their foray from police headquarters. Dealing then with the practicalities of the situation, the only basis upon which the police could possibly have premised their arrest of Miller was the statement allegedly made by Gatlin implicating him in the Hickory robbery. Even assuming the police's claim that Gatlin did in fact implicate Miller, Gatlin's intoxicated and confused state combined with the fact that the police made no effort to test the reliability of their informant or his information demonstrate that the police, acting solely upon this information, lacked probable cause to arrest Miller without warrant for the Hickory robbery. As this Court has said in the Wrightson case, supra, in invalidating an arrest based upon a tip of an informer whose reliability could not be tested:

> "... the tendency of police officers to arrest people without warrants and without probable cause is a matter of vast public importance, and it has been of such importance since Colonial days. Courts cannot put a stamp of approval upon actions of the police when the officers, challenged by an accused, fail or refuse to demonstrate compliance with the rules which circumscribe their authority ..." (95 App. D.C. at 392, 222 F.2d at 558)

As a consequence, the arrest of Appellant Miller was illegal and the post-arrest statement of participation in the Hickory robbery elicited from Miller was inadmissible. Wong Sun v. United States, supra, at 454; Bynum v. United States, 104 App. D.C. 368, 262 F.2d 465 (1958); see Nueslein v. District of Columbia, 73 App.

D.C. 85, 115 F.2d 690 (1940). It was, therefore, error for the trial judge to receive in evidence any testimony concerning that statement.

This erroneously admitted evidence irreparably prejudiced Miller. The jury found him guilty of the Hickory robbery and the only evidence in the record upon which their verdict could have been based is the identification testimony of one of the two Hickory waitresses and the erroneously admitted testimony concerning Miller's incriminating statement. Without even considering at this point the nature of the identification testimony, which will be discussed infra, it cannot be denied that a confession "is a most persuasive form of proof" which, if erroneously admitted, must be assumed to have prejudiced the confessing party. Jones v. United States, 113 App. D.C. 256, 258, 307 F.2d 397, 399 (1962). Consequently, it would be improper to permit the jury verdict to stand, based in part as it must have been, upon evidence obtained from Appellant Miller in violation of his basic constitutional right to be free from illegal arrest. See Williams v. United States, 105 App. D.C. 41, 44, 263 F.2d 487, 490 (1959).

(2) Miller's arrest without warrant was accomplished by an illegal entry by the police

The evidence shows that the police entered a home at 1114 Eaton Road without warrant, engaged in a bottom-to-top search of it and, upon discovering a man in the attic, arrested him. The man turned out to be Appellant Miller. In the previous section, we have shown why the police lacked probable cause to arrest Miller. Herein, we shall show that the police entry at 1114

Eaton Road was also illegal and, as a result, it serves as an independent cause for holding that Miller's arrest was illegal and constitutionally prohibited by the Fourth Amendment. Miller v. United States, 357 U.S. 301 (1958); McDonald v. United States, 335 U.S. 451 (1948); Johnson v. United States, supra; Accarino v. United States, 85 App. D.C. 394, 400, 179 F.2d 456, 462 (1949). In Accarino, this Court observed that "from the early days of the common law the breaking of doors to make an arrest without a warrant was lawful only if necessary" and that the "right to break open a door to make an arrest requires something more than the mere right to arrest." (179 F.2d at 464). Indeed, this Court has stated that, in the absence of the most urgent of necessities requiring immediate action, the police may not enter a home to make a felony arrest without warrant. District of Columbia v. Little, 85 App. D.C. 242, 246-47, 178 F.2d 13, 17-18 (1949).

The evidence also shows that Appellant Miller was a lawful occupant of the residence in which he was arrested and that his lawful possession of a key to that residence gave him a legitimate power of control over the premises. Jones v. United States, 362 U.S. 257 (1960). It was the home of a friend of Miller and the friend had given Miller a key to her home. Miller was frequently present there. In the Jones case, the Court stated unequivocally that anyone legitimately on the premises where a search occurs may challenge its legality.

According to the police, they were acting upon information supplied to them by a third person which implicated Miller in a

felony. According to them, they were supplied with Miller's full name and were told where he could be found. None of the information supplied to them gave the slightest indication that Miller was in flight. Appellant Miller testified that when the police first banged on the door at 1114 Eaton Road, he was asleep inside. Being aware of Miller's name and the neighborhood in which he could be found, the police were, in these circumstances, required to place their reason for seeking Miller's arrest before a magistrate so that the sufficiency of their reason could be evaluated by a judicial officer before entering a home to make an arrest. The record fails to disclose any urgently necessitous circumstances precluding the requirement of prior judicial intervention. Consequently, the failure of the police to seek an arrest warrant prior to arresting Miller resulted in an illegal arrest in the circumstances of this case.

We turn now to the evidence which demonstrates the illegality of the entry made by the police at 1114 Eaton Road. At 6:30 A.M., seven or eight armed police officers had surrounded the house. After the police assigned to cover the front of the house knocked at the front door, a woman inside informed them that the front door was broken and asked them to come to the back door. The policemen covering the front door so informed the three police officers, including a Pvt. Alleva, who were covering the back door. When the woman opened the back door, she was confronted by the three officers, one of whom probably had his gun drawn. The record is barren of any conversation between the three officers and the woman prior to their entry into the house. Before

entering the house, it is claimed that the three officers identified themselves.[21] However, it is indisputably clear that the officers did not state the purpose for which they demanded entry until after they had actually entered the house.[22]

Although the police do not assert that they were invited to enter the house, Pvt. Alleva testified that the woman did not "object" to their coming in and making a search of the house. (J.A.73) The record does not support this opinion testimony. Indeed, inasmuch as the police did not state their purpose until after entering the house, it is inconceivable that the mere opening of the back door by an occupant of the house could be construed as a consent to entry, much less to a search of the whole house.

Furthermore, it must be remembered that the woman who opened the door found herself accosted by three armed policemen who immediately entered after the door was opened. This Court has found that such an admittance by the occupant does not constitute the consent required to enter without warrant. Judd v. United States, 89 App. D.C. 64, 190 F.2d 649 (1951). In Judd, this

---

21/ The nature of this identification was as follows, according to Pvt. Alleva:

> "Well, we have two uniform policemen, if I remember right, or one uniform policemen with us at the time, and we also identified ourselves." (J.A.72)

22/ Pvt. Alleva testified that after they were in the house "a while", he asked the woman if Miller was there and she said "no". (J.A.73)

Court observed that the Government has the burden of showing a consent which is unequivocal and freely given. The circumstances of this entry here clearly warrant the inference that intimidation and duress were implicit in this situation and that the police entry was forcible and without consent.

Furthermore, the police entered without having stated the purpose of their entry. In the absence of a statement of purpose, their forcible entry was illegal Miller v. United States, supra; Hair v. United States 110 App. D.C. 153, 289 F.2d 894 (1961); Keiningham v. United States, 109 App. D.C. 272, 287 F.2d 126 (1960); Gatewood v. United States, 93 App. D.C. 226, 209 F.2d 789 (1953); Accarino v. United States, supra. In the words of this Court in the Hair case, supra, it would be the sheerest sophistry to describe the police entry at 1114 Eaton Road as "peaceable" merely because three armed policemen walked through a door opened by a silent woman. In the Miller case, supra, the Supreme Court assumed that a forcible entry made by the police in order to execute an arrest without warrant must be tested by criteria identical to those embodied in 18 U.S.C. Sec. 3109 which deals with entry to execute a search warrant. Thus, it is reasonable to conclude that the police officers' entry to accomplish Miller's arrest without warrant violated that statutory provision which requires the giving of notice by the police of their "purpose" as well as their "authority" prior to forcible entry.[23/]

23/ For the development of the common law on this question independently of this statutory provision, see Accarino v. United States, supra.

In summary, the arrest without warrant of Appellant Miller was illegal because (1) it lacked the support of probable cause, as discussed in the preceding section, and (2) the arrest was executed by virtue of an illegal entry into a private home in the absence of necessitous circumstances. Following this illegal arrest, Appellant Miller was taken to police headquarters for interrogation and, as a result, the record shows that Miller incriminated himself in the Hickory robbery. Despite timely objection, the trial court erroneously held such testimony to be admissible. As we have previously stated, evidence concerning this statement and the identification testimony of one of the two eyewitnesses to the Hickory robbery was the only possible basis for the jury verdict finding Miller guilty of the Hickory robbery. Thus, the prejudicial nature of the trial court's error in admitting testimony concerning Miller's incriminating statement is apparent.

(3) The detention of Appellant Miller following his illegal arrest was also violative of Rule 5(a) of the Federal Rules of Criminal Procedure.

Following Appellant Miller's incriminating statement concerning the Hickory robbery at approximately 7:15 A.M., he was detained until 1:22 P.M. on the same day before being brought before the U. S. Commissioner on a complaint charging him with the Hickory robbery. It was not until this preliminary hearing that he was informed of his rights. (J.A.1)

During this period of over six hours, Appellant Miller was subjected to lineups concerning both the Hickory robbery and the

Lee robbery, which have been previously described.

There can be no doubt that these lineups produced some of the six hour delay occurring before the preliminary hearing. It is also evident that these lineups pertained to a robbery for which Miller was not arrested and as to which the police made no interrogation following arrest. Thus, these lineups resulted in "unnecessary delay" between his arrest and the preliminary hearing and were violative of Rule 5(a) of the Federal Rules of Criminal Procedure.[24/] Mallory v. United States, supra.

Appellant Miller was identified at these lineups by a witness (Mary O. Manning) to the Hickory robbery. We shall demonstrate below the manner in which witness Manning's testimony at the trial is inadmissible because of its dependance upon her identification of Miller at these illegal lineups.

C. The Identification Evidence Which was Erroneously Admitted And In Other Respects Insufficient To Satisfy The Government's Burden Of Proof Beyond A Reasonable Doubt Cannot Support Appellants' Conviction

(1) Paul W. Gatlin

The only identification evidence which connects Appellant Gatlin with the robbery of the Lee grocery store is the testimony of Charles F. Payne. (J.A.16-7) Because of the circumstances of the identification (discussed infra), it is difficult to conceive how Payne's testimony could have had any probative force upon the

---

24/ As we have previously shown, the lineups were also illegal on the independent ground that Miller's detention was unlawful ab initio because of his illegal arrest.

issue of identification in this case. Regardless of its impact however, the record is clear that the police would not have obtained even this evidence without the benefit of knowledge gained as a result of Gatlin's unlawful arrest and illegal detention. The police connected Gatlin with the Lee robbery as a result of witness Payne's identification of him at a line-up, the illegality of which has been discussed supra, (J.A.17-8). The trial court erroneously allowed Payne not only to identify Gatlin but permitted him to refer to the previous identification at police headquarters, thus lending a credibility, in the jury's mind, to Payne's testimony which it would otherwise lack. It is reasonable to surmise that the jury could have regarded Payne's identification as more accurate and believable, after it had been pointed out to them, by testimony elicited from Payne by Appellee, that Payne had been given the opportunity to solidify his recollections on the day following the crime by virtue of the illegal lineup. This was plain and prejudicial error.

The contention will perhaps be made that this argument might preclude prosecution witnesses who participate in illegal police procedures from ever taking the witness stand.[25/] Our position requires no such result. The question at issue here is whether one must close one's eyes to any damaging effect upon Appellant

---

25/ See Payne v. United States, 111 App. D.C. 94, 294 F.2d 723 (1961), cert. denied 368 U.S. 883. It should be noted that in the Payne case, the facts clearly showed probable cause for the arrest of the accused and there was no testimony before the jury concerning a previous out-of-court line-up identification of the accused. Thus, the credibility of the identification testimony in the Payne case was not aided by the Government's exploitation of illegal police procedures.

Gatlin of the Payne identification testimony despite the fact that, through Payne's testimony, the prosecution was able to exploit the identification made by him at an illegal line-up conducted by the police. In other words, does the mere fact that this identification testimony comes from the mouth of a third party render it wholly admissible even though its weight must have been greatly enhanced by the fact that it evolved out of the illegal line-up? For, as the Court said in Wong Sun v. United States, supra:

> " ... We need not hold that all evidence is 'fruit of the poisonous tree' simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is 'whether, granting establishment of the primary illegality, the evidence to which the instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.'" (9 L.ed.2d 441 at 455)

The record is clear that Appellee's knowledge connecting the Lee robbery with a specific person originated at the line-up which occurred during a period of unlawful detention, and that testimony concerning witness Payne's line-up identification of that specific person reached the jury. Consequently, since the identification evidence implicating Gatlin with the Lee robbery was derived from the police's own wrong doing, Appellee should not be allowed to benefit from it, irrespective of witness Payne's lack of official affiliation with the police. In this connection Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920) says:

> "If knowledge of them [facts] is gained from an independent source they may be proved like any others,

> but the knowledge gained by the government's own wrong cannot be used by it in the way proposed." (p. 392, Emphasis added)

Appellant submits that the Payne testimony cannot be segregated from the illegal police procedures in this case. It has previously been recognized that the method and manner in which any evidence is obtained and utilized by the police is all important for "[t]he history of liberty has largely been the history of observance of procedural safeguards." McNabb v. United States, 318 U.S. 332, 347 (1943). This Court has itself said that it is:

> "...a matter of overriding concern that effective sanctions be imposed against illegal arrest and detention and the risks of overreaching inherent in such action. Even though highly probative and seemingly trustworthy evidence is excluded in the process, this loss is thought to be more than counterbalanced by the salutary effect of a forthright and comprehensive rule that illegal detention shall yield the prosecution no evidentiary advantage in building a case against the accused. All of this is bottomed on the Constitution itself." Bynum v. United States, 104 App. D.C. 368, 370, 262 F.2d 465, 467 (1958). [emphasis added]

Witness Payne's testimony was not only inadmissible but was also insufficient. He testified that he saw three men enter the Lee grocery store and that the one who held a gun on him was Gatlin (J.A. 16-7). He testified to this despite the fact that he could not identify or describe the other two men who came in with the one whom he said was Gatlin, other than to describe the one who stayed at the cash register as "the biggest one" wearing a long and dark leather-type coat (J.A. 14, 19-20). In any event, he testified that he could not identify the others because he did not get a good look at them.

The basis for his identification of Gatlin was as follows:

> "Q. Did you go to the back of the store?
> A. Went to the back of the store.
> Q. Did you see this man who held the gun on you?
> A. Yes, I glanced at him when he had the gun on me, like that, real fast, you know
> Q. Now --
> A. I glanced at him, see, like that, real quick ..."
> (J.A. 16)

Further, Payne's testimony shows that his "quick glance" at the man he identified was taken as he was walking toward the "far-end" (rear) of the store and that he (Payne) walked all the way back to the meat counter at the far end of the store before he turned his head. He also testified that the man he identified did not follow him to the rear of the store, but only came part of the distance (J.A. 22). Payne further testified that once he reached the back of the store he was only there a "minute or so" when all three of the men left the store. (J.A. 17) Thus, the record lacks a satisfactory explanation as to why Payne could so readily identify one of the three men and neither of the other two.

Payne could not support his estimate of the height of the man whom he observed at the scene of the crime. He at first testified that the man he could identify was about five feet four inches tall--which was average size in his opinion (J.A. 23). Upon viewing Gatlin in the courtroom he testified that Gatlin looked to him to be five feet six or seven inches tall and not as tall as six feet (J.A. 24). He then testified that a man five feet four inches in height would be shorter than himself because he was five feet six inches tall but

that the man he saw was his height. He concluded his analysis of the man's height by returning to his earlier statement that the man he could identify was average size meaning "five feet five or six inches" but that he really "...couldn't tell how tall he was" (J.A. 24). The only other person who testified concerning the Lee robbery was the proprietor of the store, Sher W. Lee. Lee was also at the illegal line-up on November 9th, but was unable to identify anyone (J.A. 10) Neither could he recognize or identify any of the defendants at the trial. (J.A. 9-10)

It is difficult to find any clear, convincing or accurate quality in witness Payne's patently weak testimony. The rule that Appellee must prove its facts with substantial evidence which excludes every reasonable hypothesis but that of guilt, Carter v. United States, 102 App. D.C. 227, 252 F. 2d 608 (1956), places witness Payne's testimony in its proper perspective. This Court should consider the patent deficiencies in Payne's testimony and the trial court's failure to grant Gatlin's motion of judgment of acquittal or to instruct the jury that they should acquit when, as here, the circumstances of the identification are not convincing. McKenzie v. United States, 75 App. D.C. 270, 273, 126 F. 2d 533, 536 (1942); see Tatum v. United States, 88 App. D.C. 386, 190 F. 2d 612 (1951); Rule 52(b), Federal Rules of Criminal Procedure, and see Judge Edgerton's dissent in Jones v. United States, 113 App. D.C. 233, 235, 307 F. 2d 190, 192 (1962).

In the light of the above deficiencies in Payne's testimony, the importance of his inadmissible testimony as elicited by the Government's attorney, particularly that portion concerning Payne's identification of Appellant Gatlin at the unlawful line-up on the day following the Lee robbery, looms very large indeed. It is impossible to say, in these circumstances, that the jury would have found Gatlin guilty of the Lee robbery beyond a reasonable doubt without benefit of the inadmissible testimony.

(2) Dennis O. Miller

The evidence before the jury which implicated Appellant Miller with the Hickory robbery was Miller's alleged confession, the inadmissibility of which has previously been discussed, and witness Mary O. Manning's identification testimony (J.A. 30). Miller's objection to witness Manning's testimony on the basis that the availability of her testimony resulted from an illegal arrest of Miller was overruled by the trial court (J.A. 30).

Although the record is not explicit, it is reasonably certain from Manning's own testimony (J.A. 29) and the testimony of Sgt. Wayland Fallin (J.A. 62, 108-9) that Manning was present at the illegal line-up[26/] on the morning of November 9th and that the jury was aware of this. The trial court's memorandum indicates that Miller was taken to police headquarters and identified at a line-up by one of the victims

---

26/ The illegality of this line-up insofar as Miller is concerned has been discussed supra.

of the Hickory robbery (J.A. 133). It is more likely that this victim was witness Manning rather than witness Alta Wilson because Wilson testified that after the robbery she never again saw the person who held the gun on her and that she would not have recognized him if she did see him because of her inability to get a "good look" at him at the time of the robbery (J.A. 37-8).

Considering the invalidity of Miller's arrest and his illegal detention as hereinbefore discussed, the prosecution's use of Manning's identification testimony was derived from illegal police procedures and its introduction in evidence clearly prejudiced Appellant Miller. The incalculable effect of Manning's testimony that she identified Miller at a line-up, which the record shows was held the morning following the Hickory robbery, prejudices Miller in that this fact could easily have added considerable weight in the jury's mind to her description of the man who held the gun on her. Here again, as with the witness Payne in relation to Appellant Gatlin, the jury could have concluded that here was a witness who had picked out the accused during a confrontation while the crime was still fresh in her mind. This portion of the prosecution's evidence was assembled as part of its proof as a result of the unlawful arrest and detention of Appellant Miller. Thus, the suppression of the evidence against Miller should be extended to Manning's testimony, especially since the McNabb rule has been interpreted to extend to all evidence

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17728

PAUL W. GATLIN, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

No. 17729

DENNIS O. MILLER, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA CIRCUIT

DAVID C. ACHESON,
United States Attorney.

FRANK Q. NEBEKER,
HAROLD J. SULLIVAN,
Assistant United States Attorneys.

JULIA P. COOPER,
Attorney, Department of Justice.

QUESTIONS PRESENTED

In the opinion of the appellee, the following questions are presented.

1. Did the district court err in refusing to suppress evidence of articles seized from, or admissions made by, the appellants at the time of arrests?

2. Does the contention, that identification testimony of witnesses must have been excluded as having been available as a result of a line-up conducted during an unnecessary delay between arrest and arraignment, merit the attention of this Court when it is raised for the first time here, and when it appears that the witnesses in identifying appellants as the persons committing robberies, merely alluded to the fact that they had seen appellants at a date subsequent to the commission of the crimes without developing evidence as to the time or circumstances thereof?

3. Did the trial court err in denying a judgment of acquittal on the grounds of insufficiency of the evidence?

706-257—63——1

INDEX

TABLE OF CASES

*Cases chiefly relied upon are marked by asterisks.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17728

PAUL W. GATLIN, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

No. 17729

DENNIS O. MILLER, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

Appellants Gatlin and Miller were indicted jointly on two counts of robbery in violation of 22 D.C. Code § 2901. The first count charged appellants with the taking of $110 from the possession of Sher W. Lee, the proprietor of a grocery store, on November 8, 1962; the second count charged the taking of $150 from the possession of Mary O. Manning, an employee of the Old Hickory Barbecue Restaurant, on November 9, 1962 (J.A. 5). Appellants went to trial before Judge Pine and a jury on February 6, 1963 (J.A. 7). At the conclusion of the government's evidence the court granted a judgment of acquittal as to

appellant Miller on the first count (J.A. 96). The jury found the appellant Miller guilty on the second count and the appellant Gatlin guilty on the first count and not guilty on the second count (J.A. 127). Each appellant was sentenced to a term of imprisonment of from 4 to 15 years (J.A. 128–129).

The evidence at trial

On November 8, 1962, at 8: 50 p.m., the Lee Grocery Store at 1201 F Street, N.E., was entered by three men. One of the men approached the proprietor at the cash register holding a gun at his neck and ordering him to the back of the store (J.A. 8). Another, brandishing a small silver pistol, herded some five customers to the back of the store. One customer, Charles Payne, testified that this second man put the gun to his side in ordering him to move back (J.A. 16, 20). Payne said that when this happened he glanced at the robber "real quick" at first, and, "Then I went to the back of the store and this same man that was continually shouting 'go back; get back; get back,' see, I turned and looked at him to see who he was" (J.A. 16; see also J.A. 23). Payne identified the appellant Gatlin as the man who held the gun at his side saying, "He wasn't that far away from me" (J.A. 16, 17). After about two minutes the three robbers fled taking $110 with them (J.A. 17, 9). The proprietor, Lee, could not identify the robbers (J.A. 10).

Early the following morning (at 2:15 a.m. on November 9, 1962) two men entered the Old Hickory Barbecue Restaurant at 922 8th Street, S.E.; ordered, at gun point, all customers and the two employees on duty to lie on the floor; and took $150 from the cash register (J.A. 28–29, 37). One employee, Mary Manning, identified Miller as the one of the two men who pointed a gun at her and told her "You get down, too" (J.A. 30, 34). She was positive that Miller was the same man (J.A. 34). She remembered him because of his high cheekbones, his color "the way he smiles" * * * "the way he smiled at me" (J.A. 33–34). She did not see the face of the other man with Miller who took the money (J.A. 35). The other employee who was at the cash register did not get a good look at the robbers (J.A. 37–38).

When appellant Gatlin was arrested at about 3:30 the same morning, he had on his person a toy revolver and considerable

change including 39 one dollar bills, 7 half dollars, 5 quarters, 23 dimes, 21 nickels and 9 pennies (J.A. 58; Tr. 216; J.A. 79). Shortly after his arrest he stated that he had gone earlier with two other men to the Old Hickory Restaurant, that he did not actually participate in the robbery that followed but covered the door (Tr. 216).

The appellant Miller, shortly after his arrest at 6:50 a.m., stated that he had robbed the Old Hickory Restaurant alone (Tr. 219–220).

The defense of the appellants was that of alibi. Both stated that they had been gambling together with others in the early evening of November 8 until around 9 o'clock (J.A. 97, 110); and that they passed the remaining hours up until early morning, together or separately, socially, in a Nichols Avenue restaurant, at home or at the homes of girl friends (J.A. 98–99, 110–111). Apart from a government witness called by the defense, the only other defense witnesses were members of Gatlin's family who testified that he arrived at home at 9:45 p.m. and again at 2 a.m. where he remained for a few minutes each time (J.A. 117–118). Miller admitted that he told police that he had robbed the Hickory restaurant but said that he had done so because he became excited about police asking questions, and that he later retracted his statement (J.A. 112).

The circumstances of the arrests

About 2 a.m. on the morning of November 9, 1962, Metropolitan Police received a call to respond to a robbery taking place at the Old Hickory Barbecue Restaurant at 8th and K Streets, S.E. (J.A. 46, 54). As a result of a description of the robbers given by witnesses at the restaurant a police lookout was flashed by radio for three colored males, ages 25 to 30 years, of medium build, weighing approximately 150 to 160 or 170 pounds—one of whom was wearing a light trench coat (J.A. 48, 55). Some forty minutes thereafter the police received another call to respond to the site of a gas station at the intersection of South Capitol Street, Howard Road and Suitland Parkway (J.A. 46, 55). The radio dispatcher explained that a cab driver there had notified the police that he had three suspicious subjects in his cab and wanted to know if there had been a look-

out for three such persons for the commission of crime (J.A. 55).[1] Private James Fallin of the Canine Corps, who responded, testified that while he did not remember whether the police dispatcher gave a description of the suspicious persons, "The dispatcher said that a cab driver had previously made a call, and thought that the three suspects allegedly could have been the ones that committed the holdup at 8th and K Streets, Southeast" (J.A. 46–47). Detective Sergeant Wayland Fallin of the Robbery Squad testified that when he responded at 2:40 a.m., "The cab driver gave a description of three subjects that fit the general description of the lookout that we had flashed of the holdup on 8th Street at about 2 o'clock." (J.A. 55.) At the gas station the cab driver pointed out to the police a direction behind the gas station where one of the three men had fled (J.A. 48, 56). Private Fallin of the Canine Corps prepared his dog for tracking and entered the area (J.A. 47). The area, a vacant lot of some five acres described as "rough terrain" (Tr. 212), was covered with high weeds and grass, six-foot shrubbery, and enbankments resulting from excavation work (J.A. 47, 84–85). Private Fallin, using a light, saw footprints which his dog was tracking (J.A. 85). After about forty-five minutes of tracking, the officer, falling over a high embankment, struck his dog and injured it (J.A. 47, 85). He therefore found it necessary to return to the highway. As he did so his partner, who had been patrolling the area, pointed out to him that a man, the appellant Gatlin, had just emerged from the area which Private Fallin had tracked (J.A. 47, 53, 87).

Private Fallin, after placing his dog in his car, apprehended and arrested Gatlin some 15 or 20 yards off the paved surface of the Parkway (J.A. 87). It was then 3:30 (J.A. 83). Gatlin was wearing a light trench coat (J.A. 51). Searching

---

[1] The cab driver testified at trial that he picked up the three male passengers in the 900 block of 12th Street, S.E.; that when he delivered the pasengers to the point of discharge at Sumner Road, S.E., a police patrol wagon pulled in behind him; that although at this time all three men were to alight, one suddenly elected to remain but could only direct him to proceed further across the bridge. The driver said that when he became suspicious and drove into the gasoline station, the man alighted and fled behind the station. He testified that neither Gatlin nor Miller was one of the three passengers (J.A. 40–45).

him the officers found a toy revolver and a large amount of change (J.A. 48; 83). Within a few minutes thereafter, Gatlin was turned over at the scene of his arrest to members of the robbery squad who took him immediately to their office at police headquarters (J.A. 48, 56–57). They arrived at the robbery squad at 4:05 a.m. and immediately began the necessary administrative work connected with preparation of a line-up sheet and statement of facts (J.A. 58, 63). Within fifteen minutes and during the course of receiving statements from Gatlin relative to this administrative work, Gatlin said that he had been involved with two others in the Hickory Restaurant robbery (J.A. 59, 63). He named the two others who were involved, identifying one of them as the appellant Miller (J.A. 61, 64). At this time Gatlin showed some evidence of having been drinking. He was slow in his answers and his speech was a little thick but he was not drunk. He was coherent and in control of his faculties (J.A. 59, 80; Tr. 220–221). Present at the time, in addition to Detective Sergeant Fallin of the robbery squad, were four other officers including the two arresting officers from the Canine Corps (J.A. 80).

After Gatlin made his statement, the officers set out in four cars in search of Miller. Gatlin went in one car (J.A. 65). They did not find Miller at the first stop, the home of his employer (J.A. 66). A second stop was made at Gatlin's home on Eaton Road, S.E., where the police talked to his mother (J.A. 66–67). Gatlin suggested finally that Miller might be at a girl friend's house at 1114 Eaton Road, S.E. Gatlin told police that Miller had a gun and would use it (J.A. 60). Thereupon eight police officers proceeded to this Eaton Street address (J.A. 64), arriving at about 6:40 (J.A. 68). Some of the officers knocked on the front door and identified themselves (J.A. 72). A woman inside called to tell the officers that she could not open the front door because it was broken and directed them to come to the back door (J.A. 89; 72). This message was conveyed to Private Alleva who stood at the back of the house with two other officers (J.A. 89). Private Alleva testified that the woman then opened the door (J.A. 71). He said (J.A. 69):

706-257—63——2

> The woman let us in the back door; she said she could not get the front door open, that the door was broken. And myself and a couple other officers went in the back way, and we asked if Miller was home, and she told us no.

When Private Alleva and his fellow officers entered and saw that the front door was in fact barricaded they proceeded to search the house (J.A. 69). At this time Private Alleva (who had been told that Miller had a gun (J.A. 70)) drew his gun (J.A. 72, 89). In a hallway, Alleva noticed that the cover of a transom leading to an attic was not flush on its moulding. When he tried without success to push open the cover he knew someone was on top of it. He ordered the person to come down. Appellant Miller came down and was taken into custody at approximately 6:50 a.m. (J.A. 70–71, 61).

Miller was taken immediately to the Robbery Squad Office (J.A. 61) at police headquarters where he arrived some twenty minutes later at about 7:10 a.m. He was told what Gatlin had said with regard to the Hickory Restaurant robbery. Five minutes thereafter at 7:15 he told police that he alone had committed the robbery (J.A. 62).

After Miller's admission at 7:15 a.m., the police immediately began preparations for a line-up by calling victims to the robbery squad (J.A. 62).

The appellants were arraigned at 1:22 p.m.

The objections to admissibility of evidence and rulings thereupon

Pretrial

On January 4, 1963, approximately a month before trial, the appellant Gatlin filed a motion to suppress the use as evidence of the toy gun, can of motor oil, and the money taken from him at the time of arrest, as well as any oral confessions or admissions made to the police, on the ground that he had been illegally arrested without probable cause (J.A. 6). After a hearing at which testimony was heard as to the circumstances leading to Gatlin's arrest, Judge Sirica denied the motion to suppress on January 11, 1963 (J.A. 7).

Trial

The first objection voiced by Miller as to the admissibility of evidence was made at trial during the direct testimony of the grocer, Lee. At this time counsel for Miller objected to any testimony by Lee as to what took place at a police line-up on November 9, on the ground that Miller had been illegally arrested and illegally detained thereafter. Although the objection was overruled, government counsel indicated that his inquiry would go only to the ability of the witness to identify the defendants "now" (Tr. 11). The witness could not so identify the appellants.

A second objection was made by Miller to the testimony of the witness Manning, the employee of the Hickory Restaurant who identified Miller as a robber, on the ground that the "availability of testimony of this witness is solely the result of an illegal arrest of the defendant Miller, and therefore is the fruit of that illegal arrest" (J.A. 30). Gatlin joined in the objection and the objection was overruled (J.A. 30).

After the taxi-cab driver had testified that his suspicions as to three men had caused him to call police to the scene where Gatlin had been arrested but that neither of the three men was Gatlin or Miller, counsel for Gatlin asked if Judge Pine would entertain a motion to quash "the arrest". Judge Pine ascertained from counsel that such a motion had previously been denied, but when counsel for Miller explained that there had been no such hearing as to Miller, Judge Pine agreed to hear the motion (J.A. 45; Tr. 78). Counsel for Gatlin indicated at this time that he would also like a hearing to determine the admissibility of any oral admissions should they be offered in the case.[2] At the conclusion of the hearings, Judge Pine

---

[2] During the hearing when government counsel asked an officer what time a police line up occurred, counsel for Gatlin objected and the court agreed that this was immaterial to the issue of probable cause to arrest. The question was withdrawn (Tr. 107–108).

Upon arguments on the motion counsel for Miller argued that there was no probable cause for his arrest and that the officers entered a house to arrest him without an invitation (Tr. 194, 197). Counsel for Gatlin, in addition to his argument of lack of probable cause to arrest, observed that evidence of identification made during a period of illegal detention was inadmissible under *Bynum* v. *United States*, 104 U.S. App. D.C. 368, 262 F. 2d 465 (1958). When the court observed that the government had

denied the motions, holding that probable cause existed for the arrests of appellants, that they had been legally arrested, and that neither their statements nor the articles seized from Gatlin were subject to suppression (J.A. 78). (A written memorandum to this effect was filed by Judge Pine on March 15, 1963) (see J.A. 129).

It was not until the trial had proceeded again before the jury and the government's last witness was testifying that any objection was voiced by Gatlin as to the admission of evidence allegedly obtained during a period of unnecessary delay in arraignment within the meaning of *Mallory* v. *United States*, 354 U.S. 449. The officer, who was present but not participating in the questioning at the time of Gatlin's admission as to the Hickory restaurant robbery, testified that his statement came after 45 minutes of questioning as opposed to the 15 minute period previously established by testimony (J.A. 90, 91). Detective Fallin had earlier testified to Gatlin's confession, without a *Mallory* objection (J.A. 216).

STATUTE INVOLVED

Title 22, District of Columbia Code, Section 2901 provides:

> Whoever by force or violence, whether against resistance or by sudden or stealthy seizure or snatching, or by putting in fear, shall take from the person or immediate actual possession of another anything of value, is guilty of robbery, and any person convicted thereof shall suffer imprisonment for not less than six months nor more than fifteen years.

SUMMARY OF ARGUMENT

Evidence as to articles taken from the person of the appellant Gatlin and admissions made by both appellants at the time of the arrests, was properly admitted at trial over objections that the evidence should have been suppressed as having been obtained as a result of illegal arrests.

There was probable cause for the arrests of both appellants. The police possessed information as to the general description

---

offered no such evidence, counsel retorted that without such identification the "defendants wouldn't be here" (Tr. 192–193).

of three men who had committed a robbery in the early morning hours. Ninety minutes thereafter, in the same general area of the crime, they observed Gatlin, who answered the general description of one of the three robbers, as he emerged from a deserted lot—a lot where the police had been tracking one of three men who were apparently eluding police and who, the police had reason to believe, answered the general description of the three robbers. There was thus probable cause to arrest Gatlin, and his voluntary statement, admitting participation in the robbery, naming Miller as one of his accomplices and specifying Miller's probable whereabouts, furnished the police probable cause to arrest Miller.

The police entered a house to arrest Miller after knocking and identifying themselves and after the door had been opened to them. The fact that they did not announce their purpose before entering did not render their entry illegal since there was no breaking involved. Moreover no evidentiary consequences would be involved even if the entry had been illegal. The causal relation between an alleged illegal entry and Miller's voluntary statement subsequently made at police headquarters is too remote to subject the admission to exclusion by virtue of the "fruit of the poisonous tree" doctrine.

Appellants may not urge here for the first time that the testimony of witnesses identifying them at trial should have been excluded because the witnesses first identified them at a police line-up held during an unnecessary delay in arraignment. Moreover, the "fruit of the poisonous tree" doctrine does not operate to exclude testimony of a witness to a crime merely because he was called to identify a defendant at a time before arraignment. The witnesses did not testify as to the circumstances of the prior identification.

The evidence as to each appellant—consisting as to Gatlin of positive identification by an eyewitness to the crime, and as to Miller, of positive identification by an eyewitness and the oral admission of Miller—was sufficient to go to the jury.

ARGUMENT

I. The articles seized from the appellant Gatlin and the oral admission of the appellants were properly admitted into evidence

A. There was probable cause for the arrest of Gatlin

The appellant Gatlin contends that he was illegally arrested without probable cause and that therefore it was prejudicial error for the court to have admitted into evidence against him a toy pistol seized from him at the time of arrest, testimony regarding the pistol and money similarly seized, and incriminating statements made by him (as to an offense of which he was acquitted) shortly after his arrest (Br. 22). There is no merit in this contention.

Two district judges below, after hearings as to the circumstances of Gatlin's arrest, correctly held that the arrest was properly made without a warrant upon probable cause. The quantum of information which constitutes probable cause to arrest must be measured by the facts of a particular case. *Wong Sun* v. *United States,* 371 U.S. 471, 479 (1963). While probable cause must be based on more than mere suspicion (*Henry* v. *United States,* 361 U.S. 98, 104 (1959)), it does not require proof to establish guilt. *Draper* v. *United States,* 358 U.S. 307, 312 (1959). The long established and oft-repeated test is whether the evidence is sufficient to warrant a man of reasonable caution in the belief that a felony has been committed. *Carroll* v. *United States,* 267 U.S. 132, 162 (1925); *Brinegar* v. *United States,* 338 U.S. 160 (1949); *Wong Sun* v. *United States, supra.* Here we must consider the evidence in the light of the circumstances of the moment as viewed through the eyes of the arresting officers. *Bell* v. *United States,* 102 U.S. App. D.C. 383, 254 F. 2d 82, 87 (1958).

Private Fallin, the arresting officer, had personal knowledge that three Negro men had robbed a restaurant in southeast Washington at the early morning hour of 2 a.m. He had been given a general description of the men as to height, weight and build and he knew that one was wearing a light trench coat. When a second police call came just some 30 or 40 minutes thereafter to advise that a cab driver had called police to voice

his suspicions as to three males transported by him, Private Fallin had reason to believe there was some relationship between this call and the earlier call. He testified that "(t)he dispatcher said that a cab driver had previously made a call, and thought that the three suspects allegedly could have been the ones that committed the holdup at 8th and K Streets, S.E." (J.A. 46–47). When he responded to the site of a gas station from which the cab driver had called,[3] the driver pointed out to him an empty inaccessible area behind the station into which one of the men had fled after an earlier near-encounter with police. Tracking this deserted area with his dog, the officer could see that the dog was following footprints. Returning to the highway after a fruitless search, he was told by his partner that a man had just emerged from the search area. He then saw petitioner, wearing a light trench coat and walking (when apprehended) some 20 yards from the paved surface of the highway. Under these circumstances, the officer, as a reasonable, cautious and prudent man, had every reason to make the arrest. It is of no consequence that thereafter the taxi-driver testified at trial that appellant was not the man who fled his cab. The existence of probable cause must be measured by facts known to the officer at the moment of arrest. The information that the suspected person was one of three men, bearing the general description of the subject of a recently-issued "lookout" for a robbery committed a short time earlier in the same general vicinity—the conduct of the suspect in apparently fleeing police—his presence in that desolate area during that hour of the morning—are all circumstances justifying the conclusion of probable cause. The arrest was legal, the search incidental to that arrest was legal, and therefore the evidence of items seized from Gatlin was properly admitted into evidence. Inquiry as to the use as evidence of Gatlin's confession (the Hickory Restaurant) need not be made, whether as af-

[3] Detective-Sergeant Fallin of the Robbery Squad testified that Private Fallin and his partner from the Canine Corps responded "after we were satisfied of the description that was sent to us." He said that the description given by the cabdriver fitted the general description of the robbery look-out (J.A. 55). He testified that as a "result" of his conversation with the cabdriver, a search was instituted (J.A. 78).

fected by the arrest or subsequent detention,[4] because Gatlin was acquitted by the jury of that charge. See Rule 52(a) Federal Rules of Criminal Procedure.

B. There was probable cause for the arrest of Miller

These voluntary statements given by Gatlin properly formed the basis for the arrest of Miller. Gatlin made a complete disclosure as to the Hickory Restaurant robbery (J.A. 64). He described what took place, he gave the full name of Dennis O. Miller as a participant, and he told where Miller could possibly be found (J.A. 60, 64). This was no imprecise suggestion of an informer lending itself to a drag-net search for the perpetrator of a crime such as was condemned in *Wong Sun* v. *United States, supra,* 371 U.S. 471, 480, 481 (1963). The information here was explicit—more explicit than that in *Draper* v. *United States,* 358 U.S. 307, 312 (1959) where an informer's description of a suspect arriving at a train station was held sufficient to furnish probable cause to arrest.

Gatlin was under arrest for the precise crime which he described in his implication of Miller. His description of what happened—the entry of only two men into the restaurant—matched that version described by witnesses.[5] Surely it could not be contended that on the basis of his story no warrant could have been issued for Miller's arrest. We submit that the court below correctly found that Miller's arrest was made upon probable cause. *Cf. Naples* v. *United States,* 113 U.S. App. D.C. 281, 307 F. 2d 618 (1962); *Sammie Jackson* v. *United States,* 112 U.S. App. D.C. 260, 302 F. 2d 194 (1962). Therefore, his voluntary admission made shortly thereafter was properly admitted into evidence.

---

[4] The sole subject of the only objection to the admissibility of evidence on the grounds that there had been an unnecessary delay in arraignment was the oral admission of the appellant Gatlin as to the Hickory Restaurant robbery. The objection came for the first time during the testimony of the government's last witness at a time when the admission was already in evidence (J.A. 91-92). In view of the overall testimony as to the circumstances surrounding the making of this statement, we do not think it can be seriously suggested here that the statement was subject to exclusion under *Mallory* v. *United States,* 354 U.S. 449 (1957).

[5] The suggestion that the officers had no right to rely upon Gatlin's statement because he was intoxicated is not borne out by the record. Detective-

C. The entry by police into a house for the purpose of arresting Miller did not subject his subsequent voluntary confession to exclusion

1. There was no "breaking" which charged the police with the necessity of making an announcement of purpose

The further contention of the appellant Miller that his arrest was illegal because of an unlawful entry by police into a private home (Br. 41) is likewise without merit.* The basic problem of *Miller* v. *United States*, 357 U.S. 301 (1958), relied upon by appellant concerns itself with the right of a police officer to "break" into a home to make an arrest and the civilities he must first observe. The circumstances of the instant case do not present a *Miller* problem.

When the officers here knocked on the front door (at a quarter to seven in the morning), they identified themselves. A woman's voice from within told them that the front door was broken and instructed them to go to the back. Private Alleva, the arresting officer, said he was told by one of the officers " * * * she is going to open up the back door" (J.A. 89). Private Alleva said she opened the door and "let us in" (J.A. 68, 73; Tr. 274). This entry could hardly be characterized as "breaking."

The cases relied upon by appellant either involve a forcible "breaking" (as in *Miller, supra,* or *Accarino* v. *United States*, 85 U.S. App. D.C. 394, 179 F. 2d 456 (1949)) or a "charging in" with drawn weapons (as in *Hair* v. *United States*, 110 U.S. App. D.C. 153, 289 F. 2d 894 (1961)). These cases cannot be equated to the instant case. The record here does not support the

---

Sergeant Fallin who questioned Gatlin stated that he knew he was under the influence of intoxicants because of the odor of alcohol on his breath and the thickness of his speech (J.A. 80). He said however that although the appellant was slow in his answers, he was not incoherent or drunk, he was in control of his faculties and was aware of what he was doing (J.A. 59). Detective Lynn, who was present but not participating said Gatlin was "a little slow in responding. That is he didn't respond—I mean he just didn't come out and say everything at once. He just didn't comprehend for some reason." (J.A. 92). But Lynn explained that Gatlin was cooperative, made the statement voluntarily (J.A. 92), appeared to have control of all faculties and knew what was going on (Tr. 302).

* We are assuming here that Miller had as such an interest in the premises in question so as to have standing to challenge the claimed illegal invasion of privacy. *Jones* v. *United States*, 362 U.S. 257 (1960).

contention that the officers' weapons were drawn before entry.[7] It shows no shoving nor pushing of doors nor even a hurried entry. It shows that the lady of the house, making a reasoned choice, opened the back door and permitted the officers to enter. A "peaceful entry which does not violate the provisions of 18 U.S.C. 3109" is a permissive one. *Keiningham* v. *United States*, 109 U.S. App. D.C. 272, 287 F. 2d 126 (1960). Since the entry here was permissive, it is of no import that the officers did not indicate until after entry that they were looking for Miller.

2. There was no causal relation between the entry to arrest and Miller's subsequent voluntary confession at police headquarters

Moreover, even if the entry here had been illegal, no evidentiary consequences would flow therefrom. The police seized no evidence on the premises which was introduced at trial.[8] And it would not follow, as petitioner suggests, that his oral confession made later at police headquarters must have been suppressed as the "fruit of the poisonous tree." Cf. *Silverthorne Lumber Co.* v. *United States*, 251 U.S. 385 (1920). As the Supreme Court said in *Wong Sun, supra*, 371 U.S. at 487–488:

> We need not hold that all evidence is "fruit of the poisonous tree" simply because it would not have come to light but for the illegal actions of the police. Rather the more apt question in such a case is "whether, granting establishment of the primary illegality, the evidence to which the instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." Maguire, Evidence of Guilt, 221 (1959).

---

[7] This is evidenced by the following colloquy (J.A. 72) :

"Q. You had your gun drawn, didn't you?

"A. No.

"Q. Did the other officer have any guns drawn?

"A. I don't remember. I didn't see any. I didn't—I honestly don't recall whether they did. I imagine one of them did.

"Q. But you don't recall for sure?

"A. No.

"Q. If they _____

"A. No, I don't _____."

[8] A gun seized in the attic was held not to be sufficiently connected with Miller to be admissible (Tr. 207).

Miller's voluntary incriminating admission made at headquarters cannot be said to have come about as a result of the exploitation of the manner of police entry in previously arresting him. There is no causal relationship between the claimed illegal activity and the evidence claimed to be subject to exclusion.

II. Testimony identifying appellant at trial by witnesses who had observed appellants at a police line-up was not subject to exclusion under *Mallory*

A. No claim was made at the trial that the police line-up took place during an unnecessary delay in arraignment

Appellants contend that identification evidence at trial was the product of a "line-up or line-ups" taking place during an illegal delay in arraignment within the meaning of Rule 5(a) of the Federal Rules of Criminal Procedure and therefore should have been excluded at trial (Br. 31, 46). It does not appear however that any such objection was voiced at trial. As noted above the appellants objected to the testimony of the identifying witnesses only on the ground that their testimony was available as a result of an illegal arrest (J.A. 30). The issue now raised was not preserved for presentation on appeal. See *Williams* v. *United States*, 113 U.S. App. D.C. 399, 308 F. 2d 652 (1962), certiorari denied, 372 U.S. 970; *Johnson* v. *United States*, 110 U.S. App. D.C. 187, 290 F. 2d 378 (1961).

The logic of this preclusion is apparent for on the circumstances of this record we do not concede that the line-up took place during an illegal detention. What constitutes an unnecessary delay depends upon the overall circumstances—not only the time element, but the reasonableness and purpose of the police conduct, the necessity for administrative procedures etc. See *Mallory* v. *United States*, 354 U.S. 449, 454–456 (1957). Since appellants did not raise this contention below we can only speculate as to the time, duration, nature and primary purpose of the line-up (See J.A. 109). We do know however that the officers started preparations for the line-up shortly after Miller was arrested (J.A. 108, 62). And it is certainly true that "* * * confrontation may be beneficial to the accused rather than damaging to him." *Payne* v. *United States*, 111

U.S. App. D.C. 94, 294 F. 2d 723, 727 (1961), certiorari denied, 368 U.S. 883.

B. Whether or not the line-up occurred during an unnecessary delay in arraignment, the "fruit of the poisonous tree" doctrine does not insulate appellants from identification at trial by witnesses who initially saw them at such line-up

The *McNabb-Upshaw-Mallory* exclusionary rule enforcing the statutory command of Rule 5(a) has traditionally been applied to confessions alone.[9] Appellants cite no case where any court has extended the "fruit of the poisonous tree" doctrine to exclude the testimony of witnesses merely because they initially identified the defendant during a delay in arraignment. On the other hand, this specific contention was rejected in *Payne* v. *United States, supra,* 111 U.S. App. D.C. 94, 294 F. 2d 723, 727 (1961), certiorari denied, 368 U.S. 883, where this Court said:

> The suppression of the testimony of the complaining witness is not the right way to control the conduct of the police or to advance the administration of justice. The rights of the accused in a case like the present are adequately protected when the complaining witness takes the stand in open court, for examination and cross-examination.

Cf. *Bynum* v. *United States,* 107 U.S. App. D.C. 109, 274 F. 2d 767 (1960) discussed in *Payne, supra,* at 294 F. 2d 726–727.

Appellants attempt to distinguish *Payne* by arguing that the trial judge in that case allowed the complaining witness to identify the defendant as he sat in the courtroom but did not permit any reference to the identification made at police headquarters (Br. 48). (*Payne* expressed no opinion as to whether this last restriction was necessary under *Mallory,* 294 F. 2d at 726.) The record in the instant case, however, does not bear out the appellants' contention that they have been prejudiced because the trial court erroneously permitted witnesses against them to buttress their testimony at trial by testifying as to the previous identification made at the police line-up (Br. 48, 54).

---

[9] *McNabb* v. *United States,* 318 U.S. 332 (1943); *Upshaw* v. *United States,* 335 U.S. 410 (1948).

The witness Payne who identified Gatlin as one of the persons robbing the Lee Grocery Store was asked only for the next date after November 8th when he saw Gatlin; he replied simply November 9th (J.A. 13). As to the witness Manning who identified Miller at trial, she answered in the affirmative when asked merely if there came a time after the robbery of the Hickory restaurant when she saw the robber again (J.A. 29). This could hardly be construed as evidence giving undue weight to a previous identification.[10] Moreover, even if the witnesses had been permitted to testify fully as to the prior identification, appellants would have no cause for complaint. The rationale of the *Payne* decision applies alike to courtroom identification and evidence of prior identification. In each instance the rights of an accused are "adequately protected when the complaining witness takes the stand in open court, for examination and cross-examination." *Payne, supra,* 111 U.S. App. D.C. at 98, 294 F. 2d at 727. Confrontation "holds few of the dangers which led to the promulgation of Rule 5(a) * * *". 294 F. 2d at 727.

III. The evidence was sufficient

The witness Payne repeatedly stated at trial that he saw the man who held the gun on him in the Lee Grocery Store and that Gatlin was that man (J.A. 16, 17). His first observation of Gatlin was a quick glance at short range but he deliberately observed Gatlin from the back of the store during the two-minute duration of the robbery. The witness Manning stated at trial that she was positive that Miller was the man who entered the Hickory restaurant, pointed a gun at her, and ordered her to the floor (J.A. 30, 33, 34). She remembered Miller because of his facial characteristics and his smile. It is clear that the jury attached weight to this testimony. The court instructed that as to the Lee robbery, the government's only evidence was the testimony of Payne and that as to the Hickory robbery the evidence consisted of the identification of Miller by Manning and the purported confession by Manning (J.A. 124–125). This was sufficient evidence to go to the jury.

[10] Only the witness Lee testified that he had been called to a lineup and he could not identify any of the persons who robbed him (J.A. 10).

See *Curley* v. *United States*, 81 U.S. App. D.C. 389, 160 F. 2d 229 (1947), certiorari denied 331 U.S. 839. The jury obviously accepted the government's evidence, and rejected the alibi stories of the appellants.

CONCLUSION

Therefore, it is respectfully submitted that the judgment of the District Court be affirmed.

DAVID C. ACHESON,
United States Attorney.
FRANK Q. NEBEKER,
HAROLD J. SULLIVAN,
Assistant United States Attorneys.
JULIA P. COOPER,
Attorney, Department of Justice.

U.S. GOVERNMENT PRINTING OFFICE: 1965

REPLY BRIEF FOR APPELLANTS

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 17,728 and 17,729

PAUL W. GATLIN and DENNIS O. MILLER,
Appellants,

v.

UNITED STATES OF AMERICA,
Appellee.

Appeal From Judgments of
The United States District Court
For The District of Columbia

Francis H. Caskin
Gene P. Bond

May, Shannon and Morley
1700 K Street, Northwest
Washington 6, D. C.

Attorneys for Appellants
(Appointed by this Court)

September 25, 1963

INDEX

TABLE OF AUTHORITIES

Cases:

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA

Paul W. Gatlin, No. 17,728

Dennis O. Miller, No. 17,729

Appellants,

v.

United States of America,

Appellee.

APPEAL FROM JUDGMENTS OF THE
UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF COLUMBIA

REPLY BRIEF FOR APPELLANTS

Pursuant to Rule 17(d) of this Honorable Court, Appellants file this Reply Brief in response to Appellee's brief filed September 13, 1963 in this case.

The purpose of this reply is to answer contentions made by the Government where response is deemed necessary. For the sake of brevity, however, Appellants do not respond

as such to the Government's "Counterstatement of the Case" in the belief that any misstatements contained therein are sufficiently answered by reference to the "Statement of the Case" section in Appellants' initial brief. Moreover, to the extent that the Government's brief has failed to respond to contentions raised by Appellants, Appellants rely upon the exposition of such contentions in their initial brief in order to avoid duplication.

In the interest of lucidity, we shall respond herein to the contentions made by the Government in the sequence in which the Government has discussed them.[1/]

I.

THE ARTICLES SEIZED FROM APPELLANT GATLIN AND THE ORAL ADMISSION ELICITED FROM APPELLANT MILLER WERE ERRONEOUSLY ADMITTED BECAUSE THEIR ARRESTS WERE UNLAWFUL

A. Appellant Gatlin's Arrest Lacked Probable Cause

The Government's discussion of the circumstances of Appellant Gatlin's arrest by Pvt. Fallin without warrant is fallacious because it ignores the uncontroverted testimony of witness Garnett, the cab driver whose report to the police was admittedly the only basis for the presence of the police

---

1/ All references herein to the Government's brief are to the pages of the typewritten version of their brief.

in the vicinity of the Esso station where Appellant Gatlin was summarily arrested. Witness Garnett testified unequivocally that he had reported to the police that he had had a suspicious person[1/] in his cab who had fled when the cab stopped at an Esso station at the corner of Howard Road and Suitland Parkway. (J.A. 41) The description given by the cab driver to the police of that suspicious person was essentially different from the description contained in the police "lookout" which was broadcast following the Hickory robbery. (cf. J.A. 42-3 with J.A. 48) Therefore, contrary to the contention of the Government, there was no reasonable basis for a belief that there was a relationship between the Hickory "lookout" and the cab driver's report. The Government attempts to evade the uncontradicted testimony of the cab driver by noting that "the dispatcher"[2/] who sent out the police call advising of the cab driver's report had speculated that there might possibly be some relationship between that report and the Hickory robbery "lookout". (Government Brief, p. 12) The cab driver's testimony makes clear the lack of basis for such speculation. Therefore, it can not be claimed as the

---

1/ In order to serve its contention that there was probable cause for Gatlin's arrest, the Government erroneously states that the cab driver's "suspicions as to three men had caused him to call police to the scene where Gatlin had been arrested." (Government Brief, p. 7)

2/ This person did not testify in this case and is otherwise unidentified.

Government now does, that the baseless speculation of an anonymous "dispatcher" can be used to provide the arresting officer with a reasonable belief that the man whom he arrested as the person who had fled from the cab had participated in the Hickory robbery.[1/]

Furthermore, it must be remembered that the standard to be applied to Private Fallin's arrest is external to Fallin's consciousness. It is not whether the arresting officer thought the facts constituted probable cause but whether this Court thinks they did. Private Fallin's good faith is not enough to establish probable cause. See Director General of Railroads v. Kastenbaum, 263 U.S. 25, 28 (1923) and United States v. Castle, 138 F. Supp. 436, 439 (1955) in which Judge Youngdahl noted:

> "While we do not question the good faith of the officers, their subjective good faith is not enough [to establish probable cause] unless it is bottomed upon facts within their personal knowledge, some of which at least, would be competent as evidence in the trial of the offense before a jury."

The Government also suggests that although the tracking operation undertaken by the arresting officer in the vicinity of the Esso station was fruitless, the man who fled from the cab at the Esso station was nonetheless apprehended. As a result of observations made by another officer[2/]

1/ Indeed, the arresting officer was not even sure that the man whom he arrested was the person who had fled from the cab. (J.A. 86)

2/ He was identified only as Pvt. Ray, a partner of the arresting officer.

who provided no testimony in this case and whose power to make meaningful observations is not established by the record evidence, the arresting officer approached Gatlin (who was walking along Suitland Parkway within three blocks of his home) and summarily arrested him.[1/] The arresting officer was without adequate reason to believe that the man observed by this untested officer was the object of the fruitless tracking operation.

The arrest of Appellant Gatlin was unsupported by probable cause. The Government's attempt to furnish support for it by reliance upon anonymous or untested sources of "information" cannot be tolerated if the constitutional right to be free from unreasonable search and seizure is to be preserved. The only basis for arresting Appellant Gatlin on suspicion of the Hickory robbery was the general "lookout" which was broadcast following that robbery. As a basis for arrest, it was wholly inadequate. The description of the three robbery participants contained in the "lookout" was so general as to be meaningless. (J.A. 48) Its generality was such as to make a suspect of every six-foot Negro of relatively average weight who was abroad during the early morning hours of November 9, 1962 and unfortunate enough to be dressed in "light" or "dark" clothing or a "light trench coat".

1/ The arresting officer was not even aware of where this other officer, Pvt. Ray, had been while Pvt. Fallin was engaged in the tracking operation. (J.A. 87)

Finally the Government's attempt to characterize (1) Appellant Gatlin as "apparently fleeing" the police at the time of arrest and (2) the place of his arrest as "desolate" is without any evidentiary basis. In fact, the record is to the contrary. However, these latter two matters have already been sufficiently answered in Appellants' initial brief.

B. The Prejudicial Evidentiary Consequences of Gatlin's Illegal Arrest

The Government concedes that the evidence (i.e. a toy pistol and $47.19 in money) seized from Appellant Gatlin at the time of arrest was erroneously admitted if the arrest was unlawful. (Government Brief, p. 13) The Government limits itself to pointing out that the evidentiary use of Gatlin's statement implicating himself in the Hickory robbery, which was allegedly elicited from him following arrest, did not prejudice him since the jury found him not guilty of the Hickory robbery.

However, the prejudicial nature of the evidentiary use of the items seized from him at the time of arrest is clear because the Government at the trial was assiduous in attempting to connect these items with a participation by Gatlin in the Lee robbery as to which the jury found him guilty.

C. The Arrest of Appellant Miller Lacked Probable Cause

While contending that the police had probable cause for arresting Appellant Miller on suspicion of the Hickory robbery, the Government concedes that the sole basis for his

arrest was the information elicited from Appellant Gatlin while the latter was under arrest. (Government Brief, p. 13) Apparently, the Government believes that if an informer supplies precise enough information, the precision of which presumably is corroborated by finding the man described by the informer, that is enough to establish probable cause for arrest. This, of course, is not the standard enunciated by the courts for testing whether or not the reliance of the police upon an informant's tip is reasonable. The courts have said that the police may rely upon such a tip as basis for arrest without warrant only if it is established that the tip was supplied by a reliable informer who had previously been tested as a source of information by the police.

There is nothing in the record to show that Appellant Gatlin was known to the police who acted upon the information which was elicited from him. Despite this, the Government suggests that the Draper case[1/] is controlling here on the issue of probable cause for Miller's arrest. (Government Brief, p. 13) In the Draper case, the arresting officer, a federal narcotic agent, acted upon information supplied by a man, a special employee of six months' duration, who had previously supplied the agent with information in other cases which had always been found to be accurate and reliable. Thus the

---

1/ Draper v. United States, 358 U.S. 307 (1959)

Draper case is clearly distinguishable. Contrary to the Government, we do contend that no warrant for Miller's arrest could have been properly issued by a judicial officer if it had been sought because the sole basis for the police's belief that Miller had participated in a felony was information allegedly[1/] elicited from an intoxicated man, who himself was under arrest, following 45 minutes of interrogation conducted by five police officers, none of whom had had any prior relationship with the man who became their informant under the duress of arrest and interrogation.

Finally, when the Government contends that the Wong Sun case[2/] is not apposite here, it is in error. In that case, the Supreme Court had before it two separate arrests, and the legality of each was in issue. The Supreme Court found that each of these arrests was unlawful for lack of probable cause. The circumstances of the second arrest [i.e. the arrest of Wong Sun], which the Government ignores, concerns us here. Prior to that second arrest, federal narcotic agents had previously arrested other persons (James Wah Toy and Johnny Yee) for illegal possession of narcotics.[3/]

1/ We say "allegedly" because Appellant Gatlin repeatedly denied that he had implicated himself or Miller in the Hickory robbery. It is also to be noted that the jury acquitted Gatlin of the Hickory robbery charge.

2/ Wong Sun v. United States, 371 U.S. 471 (1963)

3/ The arrest of Johnny Yee was not in issue in Wong Sun.

Following the arrests of Toy and Yee, the arresting agents elicited from Yee the implication of Wong Sun, and Toy thereupon led the agents to the place where Wong Sun was arrested. Obviously, the preciseness of the information supplied to the agents which led them to Wong Sun cannot be denied. However, the Supreme Court held that the arrest of Wong Sun lacked probable cause and adopted the reasoning of the court below. The rationale for this holding was that the information leading to Wong Sun's arrest had been supplied by an informer who had not been shown to be reliable.[1/] It was immaterial, as far as the Supreme Court in Wong Sun was concerned, that the information leading to Wong Sun's arrest was elicited from two other persons who had already been arrested on suspicion of the same crime.

D. The Illegal Arrest of Appellant Miller was Accomplished By An Illegal Entry

The Government concedes that the police made no announcement of "purpose" prior to entering the private residence within which they arrested Appellant Miller. (Government Brief, p. 15) However, it contends that such announcement of "purpose" was unnecessary because the entry was made with consent. The Government supports this contention by alleging

---

1/ Wong Sun v. United States 288 F.2d 366, 370 (9th Cir. (1961)

that the record shows that "... the lady of the house, making a reasoned choice, opened the back door and permitted the officers to enter". (Government Brief, p. 15) This characterization of the record is fanciful and without reasonable basis.

The facts are that "the lady of the house" did open the back door after eight armed police officers surrounded the house and demanded entry at approximately 6:45 A.M. on a day in November. There is nothing in the record to show that she invited the police to enter[1/] and, after the police had entered the house, she responded in the negative when one of the officers asked her if Miller was in the house. (J.A. 73) Once the police learned this, there was even less reason for continued search of the premises without benefit of an arrest or search warrant. If the police inquiry concerning Miller's presence had been made prior to their entry, as it should have been, they would have undoubtedly received the same negative answer, thus precluding any but a forcible entry. The fact that their inquiry was belatedly made after they were in the dwelling cannot properly be used to justify the subsequent searching expedition which was conducted throughout the home. Once the "lady of the house" informed the police that the person they wanted was not there, the police were obliged to either halt their searching activity or apply for a warrant.

1/ The arresting officer himself was unable to say that the police were invited to enter.(J.A. 73)

This is not to suggest, as the Government contends, that the police entry was, in fact, permissive and peaceful. In the circumstances, such an inference is wholly unwarranted. The Government would apparently impose upon the invaded party the duty to resist the armed force of eight police officers with bare hands and broomsticks in order to rebut an inference of consent from silence. But such is not the law. This Court has held that

> "... consent must be proved by clear and positive testimony, and it must be established that there was no duress or coercion, actual or implied .... The Government must show a consent that is 'unequivocal and specific' ... 'freely and intelligently given'.... Thus 'invitations' to enter one's house, extended to armed officers of the law who demand entrance, are usually to be considered as invitations secured by force .... Intimidation and duress are almost necessarily implicit in such situations; if the Government alleges their absence, it has the burden of convincing the court that they are in fact absent." Judd v. United States, 89 App D.C. 64, 66, 190 F.2d 649, 651 (1951)

Following its discussion of the nature of the police entry leading to Miller's arrest, the Government assumes that there was an illegal entry but contends that this did not render inadmissible Miller's incriminating statement (concerning the Hickory robbery) at police headquarters following his arrest. In support of this contention, the Government merely asserts that there is a lack of causal relationship between the illegal entry (by which Miller's arrest was effectuated) and Miller's incriminating statement following arrest without in any way demonstrating how this can be. (Government Brief, p. 16)

Here again, the decision of the Supreme Court in the Wong Sun case, supra, stands in the way of the Government's contention. In the Wong Sun case, the arresting agents made an illegal entry in order to arrest one of the appellants (James Wah Toy). Having arrested him in his living quarters at gun point and handcuffed him, Toy "volunteered" a self-incriminating statement to the agents. The Government contended in the Wong Sun case that this incriminating statement by Toy resulted from "an intervening independent act of a free will." The Supreme Court denied this contention and held that evidence of the incriminating statement should have been excluded.

In the instant case, the police made an illegal entry and at gun point arrested Miller at 6:50 A.M. Having handcuffed him (J.A. 111), the eight armed policemen immediately took Miller to police headquarters whereupon Miller, without having been advised of his rights, made an incriminating statement at 7:15 A.M. in the presence of several officers after having been confronted with the implicating statement allegedly elicited from Gatlin previously. Miller himself testified, without contradiction, that his statement was made while he was in a state of high excitement and that he quickly retracted it when he had returned to normal. (J.A. 112) These circumstances demonstrate that the incriminating statement taken from Miller was not the product of an intervening independent act of

free will on Miller's part. It was clearly the inadmissible product of an illegal arrest, made without probable cause and accomplished by an illegal entry. As the Supreme Court observed in Wong Sun, it is unreasonable to infer that Miller's incriminating response "... was sufficiently an act of free will to purge the primary taint of the unlawful invasion." (371 U.S. at 486)[1/]

II.

THE INADMISSIBLE ASPECT OF THE IDENTIFICATION TESTIMONY

Initially, the Government contends that objection to the inadmissible aspect of the identification testimony of witness Payne (re Lee robbery) and witness Manning (re Hickory robbery) concerning their identification of one or the other Appellant at line-ups held during periods of unnecessary delay following arrest was not properly preserved at the trial below. (Government Brief, p. 17) The record of the trial below shows the contrary.

Insofar as the Lee robbery charge is concerned, the Government presented two identification witnesses,[2/] only one

---

1/ It is also worthy of note that in Wong Sun, the Supreme Court cites, with apparent approval, this Court's decision in Bynum v. United States, 104 App D.C. 368, 262 F.2d 465 (1958), as an example of the situation "... where a voluntary act of the accused has been held insufficient to cure the otherwise unlawful acquisition of evidence." Wong Sun, 371 U.S. at 486, footnote 12.

2/ Sher W. Lee and Charles F. Payne

of whom identified Appellant Gatlin as a participant in the Lee robbery. When the witness Payne was asked by the Government's attorney whether he had seen any of the robbery participants following the crime, Appellant Gatlin's counsel promptly objected but the trial judge permitted the witness to answer that he had seen one of the participants (whom he had previously identified in the courtroom as Appellant Gatlin) on November 9, 1962, the day following the crime.[1/] Other testimony made clear to the jury that a line-up concerning the Lee robbery had been held by the police on that day (J.A. 9-10, 108-09), and that Appellant Gatlin was present at that line-up in police custody. The objection made was sufficient to apprise the trial judge that anything other than a courtroom

---

1/ The record is as follows:

"Q. Did there come a time after November 8, 1962 when this robbery occurred, that you once again saw the individuals who had held up the grocery store? A. Well, the following morning --

MR. JONES: Objection.

MR. SCHROEDER: Just answer yes or no.

THE WITNESS: Oh, yes.

MR. JONES: Objection. The issue was whether he can identify him here and now.

THE COURT: The only question before me was whether or not there came a time later on when he identified someone. That is the only thing so far. I think you are a little premature on your objection.

BY MR. SCHROEDER:

Q. Do you remember the date when you next saw the individual -- just the date, now. Do you remember? A. The date; I seen the day after the thing." (J.A. 17-18)

identification of Gatlin by witness Payne would be objectionable. This was a timely objection which was sufficient to preserve the claim now made concerning the inadmissible aspect of witness Payne's testimony. Furthermore, it is clear that Appellants' contention (i.e., that the testimony concerning the line-up identifications by Government witnesses is inadmissible) is premised upon the theory that the line-up itself was illegal not only because of unnecessary delay but also because of the illegality of the arrests.

Insofar as the Hickory robbery is concerned, the Government also presented two identification witnesses[1/], only one of whom identified Appellant Miller. When the Government's questioning of witness Manning reached the point of identification, counsel for each Appellant objected and their objections were overruled. The ground for objection was that her testimony regarding identification was the direct result of Appellants' unlawful detention by the police during which she was permitted to view a line-up[2/]. The trial judge

---

1/ Alta Wilson and Mary O. Manning.

2/ The ground for the objection is as follows:

> "I would like to object on the grounds that the availability of testimony of this witness is solely the result of an illegal arrest of the defendant Miller, and therefore is the fruit of that illegal arrest.
>
> "The illegal arrest took place and subsequently as the result of that, they were able to obtain this witness, Mrs. Manning, who presumably is able to testify and identify this witness as the result". (J.A.30)

permitted this witness to testify that she had seen the man (whom she later identified at the trial as Appellant Miller) at a later time following the crime. The record makes clear that this later time occurred at a line-up held by the police on the morning following the Hickory robbery. (J.A. 4, 108-09) While the objection did not include an explicit reference to Rule 5(a) of the Federal Rules of Criminal Procedure, it was premised upon the contention that the line-up identification by witness Manning occurred during Appellants' unlawful detention by the police following their illegal arrests. Thus, the objection was directed primarily to Appellants' unlawful detention and implicitly encompassed the causes for unlawful detention whether it be an illegal arrest or unnecessary post-arrest delay violative of Rule 5(a).

Furthermore, the question of the explicit or literal wording of any objection pales in significance when compared to the trial court's error in admitting the objectionable identification testimony which is the basic point that Appellants are urging. This substantive point, substantially affecting Appellants' rights, deserves this Court's attention irrespective of the particular language in which the saving objections were cast. See: Robertson v. United States, 84 App. D.C. 185, 171 F.2d 345 (1948), Tatum v. United States, 88 App. D.C. 386, 190 F.2d 612 (1951). As a result of this error, the Government's case against Appellants was greatly buttressed (Appellants' Brief, pp. 34, 47-55)

The record makes clear that line-ups for the Lee and Hickory robberies were conducted hours after the arrests of Appellants on suspicion of the Hickory robbery and the completion of police interrogation dealing solely with the Hickory robbery. (Appellants' Brief, pp 30-34, 46-47). The police officers testified that prior to the line-ups each Appellant made an oral admission concerning the Hickory robbery as a result of that interrogation. Despite this, the police made no effort to bring Appellants before a magistrate for a preliminary hearing on the Hickory robbery charge. Instead, they conducted a line-up concerning a totally unrelated robbery (i.e., the Lee robbery) as well as a line-up for the Hickory robbery. The Lee line-up obviously constituted unnecessary delay in bringing Appellants before a magistrate for a preliminary hearing on the Hickory robbery charge. This illegal police procedure was clearly prejudicial to Appellants because identification witnesses at the trial were permitted to buttress their testimony by referring to their identification of one or the other Appellant at the line-ups held during this unnecessary delay.[1/]

1/ The question of the credibility and sufficiency of the testimony of these identification witnesses, absent the inadmissible aspect of their testimony, has been adequately discussed in our initial brief. (Appellants' Brief, pp 47-55).

The Government suggests that a determination of unnecessary delay violative of Rule 5(a) cannot be based upon the mere passage of time but must also reflect a consideration of "the reasonableness and purpose of the police conduct" involved. We agree, but it is apparent that the Lee robbery line-up was conducted for the sole "purpose" of connecting Appellants with a crime for which neither of them was arrested or interrogated and as to which the police had no information implicating Appellants. Such purpose was clearly unreasonable and improper.

The Government finally contends that even if the Lee and Hickory line-ups occurred during a period of unnecessary delay in violation of Rule 5(a), the testimony of the witnesses Payne and Manning concerning their identification of one or the other Appellant at the illegal line-ups was admissible because Appellants were adequately protected by having the opportunity to cross-examine these witnesses at the trial.[1/] This is surely not a proper extension of the

---

1/ In the process of reaching this final contention, the Government undertakes to answer a contention which is not made by Appellants. Thus, we do not seek "... to exclude the testimony of witnesses merely because they initially identified the defendant during a delay in arraignment." (Government Brief p. 18) We do contend, however, that the Government should not be permitted to exploit illegal police action by eliciting from their witnesses testimony concerning the nature of their participation in that illegal action.

reasoning of this Court in the Payne case,[1/] relied upon by the Government, in which the question raised here was not presented. To suggest that Appellants could have adequately protected themselves from the prejudice engendered by the illegal police procedures by cross-examining witnesses Payne and Manning as to the nature of their participation in the illegal line-ups borders upon the ridiculous. It is our position that the testimonial reference by the Government's witnesses to these illegal line-ups at the instigation of the Government's attorney constituted prejudicial error. To have cross-examined these witnesses further concerning their participation in these illegal line-ups would have only aggravated the already created prejudice.

III.

CONCLUSION

THEREFORE, it is respectfully submitted that the

1/ Payne v. United States, 111 App. D.C. 94, 294 F.2d 723 (1961) cert. denied 368 U.S. 883.

judgments of the District Court be reversed.

/s/ Francis H. Caskin

Francis H. Caskin

/s/ Gene P. Bond

Gene P. Bond

Attorneys for the Appellants
(Appointed by this Court)

September 25, 1963